

INDEX

	PAGE
Relevant Docket Entries	1
Complaint in <i>Rosario v. Rockefeller</i>	3
Complaint in <i>Eisner v. Rockefeller</i>	7
Order to Show Cause Why Three Judge Court Should Not Be Convened in <i>Rosario</i>	12
Order to Show Cause Why Three Judge Court Should Not Be Convened in <i>Eisner</i>	13
Affidavit of Burt Neuborne in Support of Motion	14
Answer in <i>Eisner</i> Submitted on Behalf of Commis- sioners of Elections of Nassau County	16
Motion to Dismiss in <i>Eisner</i> and <i>Rosario</i> Submitted on Behalf of Attorney General of New York	19
Opinion of Chief Judge Mishler Declaring Section 186 Unconstitutional	21
Judgment of the District Court	48
Decision and Order of District Court Denying Motions for Stay and Reargument	49
Notice of Appeal in <i>Rosario</i> Filed on Behalf of Attor- ney General of New York	57

	PAGE
Notice of Appeal in <i>Eisner</i> Filed on Behalf of Attorney General of New York	59
Notice of Appeal in <i>Eisner</i> Filed on Behalf of Commissioners of Elections for Nassau County	61
Order of Second Circuit Staying Decision of District Court and Scheduling an Expedited Appeal	63
Opinion of Second Circuit Holding Section 186 Constitutional	64
Judgment of Second Circuit Reversing District Court in <i>Rosario</i>	74
Judgment of Second Circuit Reversing District Court in <i>Eisner</i>	75
Order Denying Motion to Stay Mandate and Denying Petition for Rehearing in <i>Eisner</i>	76
Order Denying Supplemental Petition for Rehearing in <i>Eisner</i>	77
Order Denying Petition for Rehearing in Banc With Judges Feinberg and Oakes Dissenting	78
Temporary Stay of Second Circuit Judgment Issued by Mr. Justice Marshall	79
Order Granting Certiorari But Denying Motion for Summary Reversal, Expedited Consideration and a Stay	80

Relevant Docket Entries

Date	Proceedings
12/ 6/71	Complaint in <i>Rosario</i> filed
12/ 9/71	Order to show cause for convocation of three judge Court in <i>Rosario</i> filed
12/15/71	Complaint in <i>Eisner</i> filed
12/16/71	Order to show cause for convocation of three judge Court in <i>Eisner</i> filed
12/17/71	Plaintiffs in <i>Eisner</i> and <i>Rosario</i> withdraw request for three judge Court. Parties agree to submit case to single District Judge for declaratory relief.
1/ 8/72	Answer in <i>Eisner</i> filed on behalf of Nassau County Board of Elections
1/10/72	Motions to dismiss in <i>Eisner</i> and <i>Rosario</i> filed by Attorney General
1/12/72	Memoranda of Law submitted by all parties
2/10/72	<i>Eisner</i> and <i>Rosario</i> cases ordered consolidated; decision and judgment declaring Section 186 unconstitutional announced by Chief Judge Mishler
2/17/72	Application for stay denied; motion for reargument denied by District Court; supplemental decision and order filed
2/17/72	Notice of Appeal to Court of Appeals filed
2/22/72	Stay granted by Second Circuit; argument on expedited appeal set for 2/24/72

Relevant Docket Entries

- 4/ 7/72** Second Circuit reverses District Court and upholds constitutionality of Section 186
- 4/19/72** Supplemental petition for rehearing denied by Second Circuit
- 4/24/72** Application for stay pending filing of certiorari petition denied; application for rehearing in banc denied with Judges Oakes and Feinberg dissenting
- 4/24/72** Application for stay filed with Supreme Court; petition for writ of certiorari filed with Supreme Court; motion for summary reversal, or, in the alternative, expedited consideration on the merits filed in the Supreme Court
- 4/26/72** Temporary stay of Second Circuit opinion granted by Mr. Justice Marshall
- 5/30/72** Petition for certiorari granted; motion for summary reversal denied; motion for expedited relief denied 8-1 (Mr. Justice Stewart dissenting); application for stay of Second Circuit judgment denied 5-4 (Justices Douglas, Brennan, Stewart and Marshall dissenting)

Complaint in *Rosario v. Rockefeller***UNITED STATES DISTRICT COURT****EASTERN DISTRICT OF NEW YORK**

[CAPTION OMITTED
IN 71 C 1573]

JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28 U.S.C. 2201 et seq., this suit being authorized by Title 42 U.S.C. 1983. This is an action for a declaratory judgment and appropriate equitable relief to prevent the deprivation under color of the Election Law of the State of New York, of rights, privileges and immunities secured to the plaintiffs by the First, Fifth, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1343 (3).

PARTIES

2. (a) Plaintiff, Pedro J. Rosario, is a new duly registered voter, eighteen years of age, who registered to vote on December 3rd, 1971 in County of Kings and enrolled that same day as a member of the Democratic Party.

(b) Plaintiff, William J. Freedman, is a new duly registered voter, who became twenty-one years of age on October 12, 1971, who registered to vote on December 3rd, 1971, in the County of Queens and enrolled that same day as a member of the Democratic Party.

Complaint in Rosario v. Rockefeller

(c) Plaintiff, Karen Lee Gottesman, is a new duly registered voter, who is twenty-two years of age, who registered to vote on December 3rd, 1971, in the County of Queens and enrolled that same day as a member of the Democratic Party.

(d) Plaintiffs bring this action to challenge New York's statutory scheme regulating the participation of newly enrolled voters in primary elections.

3. (a) Defendant, Nelson Rockefeller, is the duly elected Governor of the State of New York.

(b) Defendant, John P. Lomenzo, is the duly appointed Secretary of State of the State of New York and is charged with general responsibility for the administration of the Election Laws of the State of New York.

(c) Defendants, Maurice J. O'Rourke, James M. Power, Thomas Mallee and J. J. Duberstein, are the duly appointed Board of Elections in The City of New York and are charged with responsibility for the administration of the Election Law of the State of New York, in the City of New York.

4. The individual plaintiffs bring this action pursuant to Rule 23 (b) of the Federal Rules of Civil Procedure, on behalf of each individual plaintiff and on behalf of all others similarly situated, namely, all persons whose attempted enrollment as a member of a political party, pursuant to Sections 186 and 187 of New York's Election Law is frustrated and impeded by the operation of Section 186 of the Election Law, and Section 187 of the Election

Complaint in Rosario v. Rockefeller

Law. There are questions of law and fact common to the class and the named plaintiffs will adequately protect the interest of the class.

5. Upon information and belief, at all times relevant to this Complaint, defendants have acted under color of Section 186 of New York's Election Law which forbids any enrollments in a political party filed subsequent to a general election from becoming effective until one week after the next annual general election. The net effect of Section 186 is to disqualify from participation in party primaries all persons who were not duly registered voters and enrolled party members at the preceding general election.

THE ISSUE

6. Each of these plaintiffs could have registered and enrolled on or before October 2nd, 1971, the last date of registration for the November 1971 elections. They each did not do so. When they enrolled on December 3rd, 1971, their enrollment ballots were put into a box in compliance with Section 186 and said enrollment box will not be opened under present law until after the 1972 General Elections. Each of them by operation of the Section is ineligible to participate in the local or Presidential party primaries in June 1972.

CAUSE OF ACTION

7. New York's statutory scheme governing the enrollment of voters in political parties unconstitutionally disqualifies plaintiffs, and members of the plaintiff class, from full participation in the electoral process by disenfranchis-

Complaint in Rosario v. Rockefeller

ing newly enrolled voters from participation in party primaries in the absence of any compelling state justification for such an abridgment of the franchise.

WHEREFORE, plaintiffs pray that:

(1) this Court convene a statutory United States District Court to hear and determine this action pursuant to Title 28 U.S.C. Sections 2281 and 2284;

(2) the statutory United States District Court declare that the provisions of Section 186 of New York's Election Law are unconstitutional;

(3) the statutory United States District Court grant plaintiffs appropriate equitable relief to assure their participation in the 1972 primary elections scheduled for June, 1972;

(4) The statutory United States District Court grant such other and further relief as to it may seem just and proper.

Dated, Brooklyn, New York
December 6th, 1971.

SEYMOUR FRIEDMAN

26 Court Street

Brooklyn, New York 11242

Attorney for Plaintiffs

Complaint in *Eisner v. Rockefeller*

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

[CAPTION OMITTED
IN 71 C 1621]

I. JURISDICTION

1. This is a civil action brought pursuant to Title 42 U.S.C. Sec. 1983 to redress the deprivation under color of Section 186, Section 187 and Section 117 of the Election Law of the State of New York of rights, privileges and immunities secured to plaintiff by the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States and by the Voting Rights Act of 1970 (Title 42 U.S.C. Section 1973(a)(a)). Plaintiff seeks a declaratory judgment and injunctive relief pursuant to Title 42 U.S.C. 1983; Title 28 U.S.C. Section 2201 et seq. and Title 28 U.S.C. Sections 2281 and 2284, protecting plaintiff's constitutional rights to participate in the New York State Presidential Primary Election scheduled for June 20, 1972.

II. PARTIES

2. Plaintiff, Steven Eisner, is a duly registered voter in the County of Nassau who has been informed that he will be ineligible to participate in the New York State Presidential Primary Election scheduled for June 1972 because he was not registered to vote as an enrolled Democrat in the November 1971 general election.

Complaint in Eisner v. Rockefeller

3(a) Defendant, Nelson Rockefeller, is the duly elected Governor of the State of New York.

(b) Defendant, John P. Lomenzo, is the duly appointed Secretary of State of the State of New York and is charged with the duty of enforcing the provisions of New York's Election Law in connection with the Presidential Primary Election scheduled for June 20, 1972.

(c) Defendants, William D. Meissner and Marvin D. Cristenfeld, are the duly appointed Commissioners of Elections for Nassau County and are charged with the duty of enforcing the provisions of New York's Election Law in Nassau County.

4. Upon information and belief, at all times relevant hereto, defendants were acting under color of law of Sections 186 and 187 of New York's Election Law, which disqualify plaintiff from participating in the June 1972 Presidential Primary Election because he was not registered to vote as an enrolled Democrat in the November 1971 general elections, and Section 117 of New York's Election Law which precludes the issuance of absentee ballots in primary elections.

III. THE INCIDENTS AT ISSUE

5. Plaintiff, Eisner, first became eligible to vote on December 30, 1970, upon the attainment of his twenty-first birthday. He has resided at 134 Home Street, Valley Stream, New York for fifteen years.

Complaint in Eisner v. Rockefeller

6. On December 13, 1971, plaintiff, Eisner, duly registered to vote in Nassau County for the first time and completed an enrollment blank designating his affiliation with the Democratic Party. He was informed, however, that pursuant to Section 186 of New York's Election Law he will be ineligible to participate in the New York State Democratic Presidential Primary Election scheduled for June 1972 because his enrollment as a member of the Democratic Party will not become effective until November 1972.

7. Plaintiff, Eisner, is currently enrolled in his senior year at the University of Buffalo and consequently will not be physically present in Valley Stream on primary day. He was informed however, that even if he were eligible to vote in the June 1972 Presidential Primary, he would be ineligible for an absentee ballot because, pursuant to Section 117 of New York's Election Law, such ballots are not available for primary elections.

IV. CAUSES OF ACTION

8. Defendants' refusal, under color of Section 186 of New York's Election Law, to permit plaintiff to participate in the June 1972 Presidential Primary Election abridges his constitutional right to participate in the electoral process in violation of his rights under the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States and his rights under the Voting Rights Act of 1970 (Title 42 U.S.C. Section 1973(a)(a)).

9. Defendants' refusal, under color of Section 117 of New York's Election Law, to provide plaintiff with an ab-

Complaint in Eisner v. Rockefeller

sentee ballot in order to participate in the June 1972 Presidential Primary Election abridges his constitutional right to participate in the electoral process in violation of his rights under the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States and his rights under the Voting Rights Act of 1970 (Title 42 U.S.C. 1973(a)(a)).

WHEREFORE, plaintiff prays that this Court:

1) Convene a statutory three judge United States District Court to hear and determine this action and that such Court;

2) Declare that Section 186 of New York's Election Law violates the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States insofar as it precludes plaintiff from participating in the New York State Presidential Primary scheduled for June 1972.

3) Declare that Section 186 of New York's Election Law violates the Voting Rights Act of 1970 (Title 42 U.S.C. Section 1973(a)(a)) insofar as it precludes plaintiff from participating in the New York State Presidential Primary scheduled for June 1972.

4) Declare that Section 117 of New York's Election Law violates the First, Fourteenth and Twenty-Sixth Amendments to the Constitution of the United States insofar as it precludes the issuance of absentee ballots for the New York State Presidential Primary Election.

5) Declare that Section 117 of New York's Election Law violates the Voting Rights Act of 1970 (Title 42 U.S.C.

Complaint in Eisner v. Rockefeller

Section 1973(a)(a)) insofar as it precludes the issuance of absentee ballots for the New York State Presidential Primary Election.

6) Grant appropriate equitable relief, if necessary, enforcing plaintiff's right to participate in the New York State Presidential Primary scheduled for June 20, 1972.

7) Grant such other and further relief as to the Court may seem just and proper.

BURT NEUBORNE, Esq.

BRUCE J. ENNIS, Esq.

PAUL G. CHEVIGNY, Esq.

New York Civil Liberties Union

84 Fifth Avenue

New York, New York 10011

(212) 924-7800

Dated: December 15, 1971

**Order to Show Cause Why Three Judge Court
Should Not Be Convened in Rosario**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71C 1573]

Upon the annexed complaint of Pedro J. Rosario, William J. Freedman and Karen Lee Gottesman, and upon due deliberation after a reading thereof, it is hereby

ORDERED, that the defendants show cause before this Court in the Courthouse, located at Tillary and Jay Streets, in the Borough of Brooklyn, City of New York, State of New York, on the 17th day of December, 1971, at 9:30 A.M. or as soon thereafter as counsel can be heard in Courtroom of the said Court, why an Order should not be made directing the convening of a Special Three Judge Court to hear and determine the allegations and issues raised in the complaint.

Service of a copy of this Order, with a copy of the complaint upon the Attorney General of the State of New York personally, on or before December 10th, 1971, at 1:00 P.M. and upon the named Commissioners of Elections herein by mail by posting on or before December 8th, 1971, shall be deemed proper and sufficient service. No previous application has been made on this case for this relief.

Dated, Brooklyn, New York, \\
December 6th, 1971.

JACOB MISHLER
United States District Judge

**Order to Show Cause Why Three Judge Court
Should Not Be Convened in *Eisner***

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71C 1621]

Upon the annexed complaint and the affidavit of Burt Neuborne, it is hereby:

ORDERED, that defendants show cause at a motion term of this Court, at Courtroom 5 of the United States District Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on Friday, December 17, 1971, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard why an order should not be made convening a three judge United States District Court to hear and determine this matter; and it is

FURTHER ORDERED, that service of a true copy of this order and the papers upon which it was granted upon the Attorney General of the State of New York and the Nassau County Attorney on or before Dec. 16, 1971 at 3:00 P.M. shall be due and sufficient service hereof.

Dated: December 16, 1971
Brooklyn, New York

JACOB MISHLER
U.S.D.J.

Affidavit of Burt Neuborne in Support of Motion**UNITED STATES DISTRICT COURT****FOR THE EASTERN DISTRICT OF NEW YORK**

[CAPTION OMITTED]

**STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:**

BURT NEUBORNE, being duly sworn, deposes and says:

1) I am an attorney for the plaintiff herein and I make this affidavit in support of plaintiff's motion to convene a three judge United States District Court herein.

2) In *Bachrow v. Rockefeller*, 71 C 930, this Court recognized that the impact of Section 186 of New York's Election Law raised substantial constitutional questions requiring the convocation of a three judge Court. The merits were not reached in *Bachrow* because the plaintiffs were found to lack standing to raise the constitutional issues.

However, the plaintiff herein, Steven Eisner, possesses unquestionable standing.

3) Accordingly, plaintiff respectfully requests the convocation of a three judge Court to hear and determine whether plaintiff may lawfully be denied an opportunity to participate in the June Presidential Primary.

Affidavit of Burt Neuborne in Support of Motion

4) Plaintiff is prepared, however, to forego his request for injunctive relief if defendants are prepared to represent that they will abide by a declaratory judgment. In that event, plaintiff is prepared to submit his constitutional claim to a single Federal District judge, without the necessity of convening a three judge Court.

5) No prior application for the same or for similar relief has been made to any Court.

BURT NEUBORNE

[Jurat omitted in printing.]

**Answer in *Eisner* Submitted on Behalf of Commissioners
of Elections of Nassau County**

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

[CAPTION OMITTED
in 71C 1621]

The defendants, WILLIAM D. MEISSER, sued herein as WILLIAM D. MEISSNER, and MARVIN D. CRISTENFELD, Commissioners of Elections for Nassau County, appearing herein by their attorney, JOSEPH JASPAN, County Attorney of Nassau County, for their Answer to the Complaint herein, allege as follows:

First: Deny that they have any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered "5" of the complaint.

Second: Upon information and belief deny each and every allegation contained in paragraph numbered "6" of the complaint, except to state that plaintiff Eisner did register to vote on December 13, 1971 at the Nassau County Board of Elections and as a separate procedure, filled out an enrollment blank which was placed in a sealed box which will be opened on the Tuesday following the next general election.

*Answer in Eisner on Behalf of Commissioners of Elections,
Nassau County*

Third: Deny that they have any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered "7" of the complaint.

Fourth: Upon information and belief, deny each and every allegation contained in paragraphs numbered "8" and "9" of the complaint.

As and for a First, Separate and Affirmative Defense, Defendants, William D. Meisser and Marvin D. Cristenfeld, Commissioners of Elections for Nassau County, Allege, Upon Information and Belief, as Follows:

Fifth: Under New York Election Law §§3-a and 149, all persons designated for uncontested offices or positions for a primary election shall be deemed nominated or elected thereto, as the case may be, without any ballot being cast. At the time of plaintiffs' claim, no contests exist. The plaintiffs are not deprived of an opportunity to cast a ballot in any primary until such a primary contest comes into being.

As and for a Second, Separate and Affirmative Defense, Defendants, William D. Meisser and Marvin D. Cristenfeld, Commissioners of Elections for Nassau County, Allege, Upon Information and Belief, as Follows:

Sixth: This Court does not have jurisdiction over New York State's primary election procedures. Neither the First, Fifth, Fourteenth or the Twenty-Sixth Amendments

*Answer in Eisner on Behalf of Commissioners of Elections,
Nassau County*

of the United States Constitution confer the power on this Court to rule upon a case in the aforesaid procedure.

WHEREFORE, the defendants, William D. Meisser, sued herein as William D. Meissner, and Marvin D. Cristenfeld, Commissioners of Elections for Nassau County, respectfully request that this complaint be dismissed.

JOSEPH JASPAN

County Attorney

Attorney for Defendants:

WILLIAM D. MEISSER and

MARVIN D. CRISTENFELD,

*Commissioners of Elections for
Nassau County*

County Executive Building

One West Street

Mineola, New York 11501

by J. KEMP HANNON,

Deputy County Attorney

**Motion to Dismiss in *Eisner* and *Rosario* Submitted
on Behalf of Attorney General of New York**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
in 71C 1573]
71C 1621

STEVEN EISNER, on his own behalf and on behalf
of all others similarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of the State of New York;
JOHN P. LOMENZO, Secretary of State of New York;
WILLIAM D. MEISSNER and MARVIN D. CRISTENFELD, Com-
missioners of Elections for Nassau County,

Defendants.

NOTICES OF MOTIONS

SIRS :

PLEASE TAKE NOTICE, upon the orders to show cause
signed December 6, 1971 in *Rosario v. Rockefeller, et al.*
and December 16, 1971 in *Eisner v. Rockefeller, et al.*, the
complaints and upon all the prior proceedings had herein,
the undersigned will move this Court on January 10, 1971
at 9:30 o'clock in the forenoon in Courtroom No. 5, United
States Courthouse, 225 Cadman Plaza East, Brooklyn, New

Motion to Dismiss in Eisner and Rosario

York, for an order pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(1) and (6) and 12(c) dismissing the complaints upon the ground that the Court lacks jurisdiction thereof, and further that they fail to state a claim upon which relief may be granted, as against the State defendants and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 10, 1971
nunc pro tunc

Yours, etc.

LOUIS J. LEFKOWITZ

*Attorney General of the State of
New York*

*Attorney for Rockefeller and
Lomenzo and Pro Se pursuant
to Executive Law § 71.*

By: A. SETH GREENWALD

Assistant Attorney General

Office & P. O. Address

80 Centre Street

New York, New York 10013

Tel. (212) 488-3396

(To all attorneys of record.)

**Opinion of Chief Judge Mishler Declaring
Section 186 Unconstitutional**

February 10, 1972

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 71-C-1573

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
GOTTESMAN, individually and on behalf of all others sim-
ilarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of The State of New York,
JOHN P. LOMENZO, Secretary of State of The State of
New York, MAURICE J. O'ROURKE, JAMES M. POWER,
THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the
BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendants.

No. 71-C-1621

STEVEN EISNER, on his behalf and on behalf of all
others similarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of The State of New York,
JOHN P. LOMENZO, SECRETARY of State of The State of
New York, WILLIAM D. MEISSNER and MARVIN D. CHRIS-
TENFELD, Commissioner of Elections for Nassau County,

Defendants.

Opinion of Chief Judge Mishler

Plaintiffs in these class actions represent voters who were qualified to register to vote and to enroll in a political party on or before November 2, 1971, the date of the last general election. They failed to do so.

In December, 1971 each named plaintiff appeared at an office of the Board of Elections in the county in which he or she resided. Each registered, demanded and received an enrollment blank. Each completed the enrollment blank in which he or she declared that he or she was in general sympathy with the principles of the political party of choice, and intended to support the nominees of that party in the general election. The completed enrollment blanks were then deposited in a locked enrollment box and kept sealed as mandated under Section 186 of the Election Law of the State of New York. They will remain sealed until the Tuesday following the next general election on November 7, 1972.¹

The actions, brought pursuant to 42 U.S.C. §1983, claim that Section 186 of the Election Law of the State of New York² is a violation of the First, Fourteenth and Twenty-

¹ The Court consolidated the actions as provided in Rule 42A.

² Plaintiff Eisner has withdrawn his complaint and prayer for relief with respect to §117, dealing with absentee ballots, inasmuch as litigation is pending on that issue elsewhere.

§ 186. *Opening of enrollment box and completion of enrollment*

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a

Opinion of Chief Judge Mishler

Sixth Amendments to the Constitution and the Voting Rights Act of 1965 (42 U.S.C. §1973) and the 1970 Amendments thereto (U.S.C. §1973 aa).

Plaintiffs seek a declaratory judgment declaring Section 186 of the Election Law of the State of New York unconstitutional.*

The June primary in the State of New York will be a contest for party nominations for State Senator, State Assemblyman, United States Congressmen, United States Senators and delegates to the national nominating conventions of the major political parties. The delegates to the national nominating conventions will in turn choose candidates of the major political parties for President and Vice-President.

New York has a closed primary system in which only duly enrolled members of a party may vote in that party's primary election. The enrollment box system provided in

central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year. L.1949, c.199; amended L.1955, c.41, eff. March 7, 1955.

* Plaintiffs originally moved for the convening of a three Judge Court, and thereafter withdrew the motion for a three Judge Court.

Opinion of Chief Judge Mishler

the statutory scheme of the New York Election Law effectively deprives plaintiffs and the members of their class who are otherwise qualified by reasons of age, citizenship and residence in the State of New York of the privilege of voting in the June, 1972 primary, running for party office,* or signing designating petitions for candidates wishing to enter the primary.

I. EQUAL PROTECTION

The right to vote, whether denominated the right of suffrage or simply "the franchise," has long been held by the Supreme Court to be one of the basic rights of citizenship. As the Court recognized in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964): "Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S., at 370, 6 S.Ct., at 1071." (377 U.S. at 561-62, 84 S.Ct. at 1981).

The scrutiny to which any infringement of the right to vote is subject under the Equal Protection Clause of the Fourteenth Amendment has become increasingly severe in the past decade. In *Reynolds v. Sims*, *supra*, the Court was faced with a challenge to the apportionment of the two houses of the Alabama Legislature. The challenge was founded on the alleged over-representation of rural districts, and a resulting violation of equal protection guarantees. The Court there said:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and

* Party officials are also elected in the primary election.

Opinion of Chief Judge Mishler

unimpaired manner is preservative of other basic civil and political rights, *any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.* (377 U.S. at 561-62, 84 S.Ct. at 1381) [Emphasis supplied.]

In *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965), the Court dealt with a challenge to a Texas constitutional provision prohibiting any member of the armed forces of the United States who moved to Texas during the course of his military duty from ever voting in any election in that state as long as he remained a member of the armed forces. After invalidating that provision on equal protection grounds the Court continued:

We deal here with matters close to the core of our constitutional system. 'The right . . . to choose,' *United States v. Classic*, 313 U.S. 299, 314, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, that this Court has been so zealous to protect, means, *at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.* (380 U.S. at 96, 855 at 780) [Emphasis supplied.]

In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966), the Court, after characterizing the right to vote as a fundamental right, went on to advise that

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, *classifications which might invade or restrain them must be closely scrutinized and care-*

Opinion of Chief Judge Mishler

fully confined. [Citations omitted.] These principles apply here. (383 U.S. at 670, 86 S.Ct. at 1083) [Emphasis supplied.]

As can easily be seen, the increasing rigor to which state statutory and constitutional provisions were subjected in *Reynolds*, *Carrington* and *Harper*, was at variance with the traditional equal protection test. That test, as enunciated in the classic definition given by the Court in *McGowan v. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101 (1961), is much less stringent. The Court in *McGowan* defined the traditional test as follows:

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* (366 U.S. at 425-26, 81 S.Ct. at 1105) [Emphasis supplied.]

At the October Term of 1968, the Supreme Court continued to enlarge the divergence between the treatment to be accorded most state statutes when attacked as violating the Equal Protection Clause and the treatment to be accorded those statutes specifically affecting the right to vote. In *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968), the Court was presented with a challenge to a set of Ohio

Opinion of Chief Judge Mishler

statutes which made it extremely difficult for any party other than the Democratic or Republican Party to achieve the status of an established party and to have its name and its candidates placed on the ballot in the general election. The statutory scheme was attacked not only as a denial of the equal protection of the laws, but also as in violation of the First Amendment freedom of association. In holding the statutes involved unconstitutional, the Court rested its decision both on the infraction of the Equal Protection Clause and on the infringement of First Amendment rights. The test applied by the Court, however, was not whether any merely rational basis could be imagined to justify the enactment of the statutes, but whether or not there was any *compelling* state interest to justify their existence.

The Court drew support for the use of this test from a case which had not involved the right to vote, but was solely concerned with First Amendment rights of association. The Court in *Williams* stated:

In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling State interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' *NAACP v. Button*, 371 U.S. 415, at 438, 83 S.Ct. 328, at 341 (1963). (393 U.S. at 31, 89 S.Ct. at 11).

The Court concluded by saying that "The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate," and "... the totality of the Ohio restrictive

Opinion of Chief Judge Mishler

laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." (393 U.S. at 31 and 34, 89 S.Ct. at 11 and 12).

The opinion in *Williams v. Rhodes*, *supra*, left one in some doubt as to whether the compelling state interest test would be applied to cases involving only voting rights and having no First Amendment overtones. Later in that same Term, however, the Court decided *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886 (1969), and did much in the *Kramer* opinion to clarify its view of the appropriate test to be used when statutes involving the right to vote are challenged on equal protection grounds.

In *Kramer*, the challenged statute restricted the vote in local school board elections to those otherwise qualified voters who were either parents of children attending schools within the local public school system or were owners or lessees of real property within the school district.⁵ The plaintiff, a registered voter, resided with his parents and was thus prevented from voting in the local school elections. No First Amendment issues were involved in the case. The Court held that the compelling state interest test applied to the voting restrictions in issue, and, finding no such interest, voided the statute.

In arriving at its decision, the Court in *Kramer* made a distinction between two types of restrictions on the franchise and held that the compelling state interest test would only be applied in cases involving statutes constituting the latter type of restriction. The Court said:

At the outset, it is important to note what is *not* at issue in this case. The requirements of §2012 that

⁵ New York Education Law §2012 (McKinney 1969).

Opinion of Chief Judge Mishler

school district voters must (1) be citizens of the United States, (2) be *bona fide* residents of the school district, and (3) be at least 21 years of age, are not challenged.

Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. *Carrington v. Rash*, 380 U.S. 89, 91, 85 S.Ct. 775, 777, 13 L.Ed.2d 675 (1965); *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904).

The sole issue in this case is whether the *additional* requirements of §2012—requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections—violate the Fourteenth Amendment's command that no state shall deny persons equal protection of the laws. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. [Footnote omitted.] Therefore, if a challenged state statute grants the right to vote to some *bona fide* residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. (395 U.S. at 625-27, 89 S.Ct. 1888-90). [Emphasis in original.]

It is evident from the Court's opinion in *Kramer* that once a state has imposed basic voting requirements of citizenship, age, and residency, all further requirements (which by their nature must be viewed as restrictions)

Opinion of Chief Judge Mishler

must of necessity be supported by a compelling state interest. This in effect places the burden of proof on the state, the reverse of the situation where the rational basis test is applied. The basic requirements of citizenship, age and residency, are to be tested, when they are challenged, by the traditional, "rational relation" test, used in garden-variety equal protection cases.

Kramer provides us with a relatively simple guide to the test to be used in examining any state statute dealing with voting rights when that statute is challenged as in violation of the Equal Protection Clause. The explicit theory propounded in *Kramer* serves to rationalize the results in the prior voting rights cases. The requirement of rural residency in order to have a fully weighted vote in *Reynolds*, the requirement of being either a civilian or a resident of Texas prior to entering military service in order to vote in *Carrington*, and the requirement of a voting fee or poll tax in *Harper*, are all "additional" requirements within the meaning of that term as used in *Kramer*. See also *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897 (1969).

One of the questions presented by the instant case is whether or not the compelling state interest test is applicable in an examination of the statute herein attacked. In order to decide this question this court must first decide whether the right to vote protected in *Kramer*, *Williams*, *Carrington*, *Harper*, and *Reynolds*, includes the right to vote in a primary election. The defendants here claim that it is not so included, arguing that a primary is an internal party matter, and further, that a party is a purely private organization.

Opinion of Chief Judge Mishler

This view of primary elections, and, indeed, of the entire process of selecting candidates to be voted for at general elections, is belied by case law. It is true that primary elections and party affairs in general were once so regarded. In *Newberry v. United States*, 256 U.S. 232, 41 S.Ct. 469 (1921), the Supreme Court was faced with a challenge to the constitutionality of what was then the Federal Corrupt Practices Act. (Section 8 of the Act as then in force.) (Section 8, Act of June 25, 1910, c. 392, 36 Stat. 822-24, as amended by Act of August 19, 1911, c. 33, Section 2, 37 Stat. 25-29.)

The plaintiffs-in-error in *Newberry*, had been found guilty in the lower court of violating Section 8, in that, among other things, they had used or expended more than the allowed amount in causing the named plaintiff-in-error to receive the Republican nomination for Senator in the State of Michigan at the primary election held on August 27, 1918. The Court found that Congress exceeded the power granted in Article I, Section 4, of the Constitution, to determine "the times, places and manner of holding elections for Senators and Representatives. . . ." since the word "elections" did not include primaries. The Court held:

The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election, and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871. Primaries were then unknown. Moreover, they are in no sense elections for an office, but merely methods by

Opinion of Chief Judge Mishler

which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in Constitutions or statutes are not necessarily applicable to primaries—the two things are radically different. (256 U.S. at 250, 415 at 472 (1921).)*

Twenty years later the Court reversed itself. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031 (1941), Louisiana election officials had been indicted under what are now Sections 241 and 242 of Title 18 U.S.C. They were accused of falsifying ballots at a primary election involving the choice of federal candidates. A challenge to the indictment was made and sustained in the lower court on the ground that Congress had no power to regulate primary elections. The Supreme Court reversed, distinguishing *Newberry* on the grounds previously adverted to, and concluding that:

Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, Section 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, *whether the voter exercises his right in a*

* Mr. Justice McKenna concurred in the opinion, as written, only on the ground that the statute under consideration had been enacted prior to the Seventeenth Amendment. He specifically reserved the question of the power of Congress under that Amendment. The other four Justices would have upheld the power of Congress to regulate primary elections.

Opinion of Chief Judge Mishler

party primary which invariably, sometimes or never determines the ultimate choice of the representative." (313 U.S. at 318, 61 S.Ct. at 1039). [Emphasis supplied.]

Finally, in *Smith v. Allwright*, 321 U.S. 469, 64 S.Ct. 757 (1944), the Supreme Court found itself able to say that "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." (321 U.S. at 661-62, 64 S.Ct. at 764).

The right to vote in primary elections is indeed part of the "right to vote," incursions into which are to be judged according to the classifications and standards set up in *Kramer*. It is clear that the right to vote protected by Article I, Section 2 of the Federal Constitution includes voting in all elections, both primary and general, dealing with the choice of federal legislators.

However, the provisions of the Equal Protection Clause of the Fourteenth Amendment apply not only to a state's discrimination in the allocation of federal rights, but also to a state's discrimination in the allocation of any other rights which the state may see fit to create. In this regard, it is to be noted that the State of New York has included the right to vote in primary elections in the rights protected by Article I, Section 1 of the New York State Constitution. As construed by the Court of Appeals in the case of *In Re Terry*, 203 N.Y. 293, 96 N.E. 931 (1911), Article I, Section 1 of the State Constitution secures to the people the right to participate in the nominating process:

Opinion of Chief Judge Mishler

The franchise of which no "member of this state" may be deprived is not only the right of citizens who possess the constitutional qualifications to vote for public officers at general and special elections, but it also includes the right to participate in the several methods established by law for the selection of candidates to be voted for. (203 N.Y. at 295, 96 N.E. at 932).

Defendants protest any reliance upon *Classic, supra*, or *Allwright, supra*, as support for the proposition that primary elections are to be considered in the same light as general elections when construing the bounds of the right to vote. They argue that the fact that all of these cases arose in what were effectively single party states vitiate their applicability to primary elections in states which do not have single party systems. In response to this it must be said that the Supreme Court was well aware of the actual nature of primary elections in Texas and Louisiana, and it specifically rejected any notion that its decisions were to be applied solely in those situations where a primary was actually a general election. As stated previously, the Court in *Classic, supra*, would have its holding apply either "[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice. . . ." [Emphasis supplied.] The Court further stated that the right to vote in a primary is protected "whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." (313 U.S. at 318, 61 S.Ct. at 1039).

That primary elections are "an integral part of the procedure of choice" in the State of New York is evident

Opinion of Chief Judge Mishler

from the extensive statutory provisions regulating such elections. Primaries in New York are conducted by Public officials and financed from public funds. Their conduct, including all means by which candidates are placed on the primary ballot, is regulated by the State. Although the primary elections in New York State as a whole cannot be said to "effectively control the choice . . .", the fact is that they do effectively control the choice in many areas of New York State which are for all intents and purposes one party areas. However, it is unnecessary for this Court to rely on the second leg of the *Classic* statement quoted in the paragraph above, as it is evident that primaries are an integral part of the procedure of choice in New York and that this suffices.

Applying the standards of *Kramer*, then, it is clear that the voting requirement embodied in §186 of the New York Election Law is a requirement neither of age, nor of citizenship, nor of residence and is thus an additional requirement which is subject to examination under the compelling state interest test. Section 186 in effect requires voters who have met the basic state requirements of age, citizenship, and residence, to have enrolled in a political party prior to the last general election preceding the primary in which they desire to vote, in order to vote in that primary.

The state interest propounded by the defendants in support of the enrollment box system is New York's interest in insuring the integrity of its political parties and in preventing inter-party raiding. Defendants argue that, absent the enrollment box provisions of §186, voters not in basic sympathy with the principles of a specific party would find it easy to organize and enroll in that party in large numbers before a primary so as to be able to

Opinion of Chief Judge Mishler

vote in that party's primary and subvert its basic interests.

It is true that such raiding is possible. See *Matter of Zuckman v. Donohue*, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct.), aff'd 274 A.D. 216, 80 N.Y.S.2d 698 (3rd Dept.) aff'd without opinion 298 N.Y. 627, 81 N.E.2d 371, 86 N.Y.S. 2d — (1948); *Matter of Werbel v. Gernstein*, 191 Misc. 274, 78 N.Y.S.2d 440 (Sup. Ct. 1948); *Matter of Newkirk*, 144 Misc. 765, 259 N.Y.S. 434 (Sup. Ct. 1931).¹

However, where a law is subject to the compelling state interest test it "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290 (1964). Assuming, *arguendo*, that the protection of party integrity is a "permissible state policy," no showing has been made that the enrollment box system is necessary to its accomplishment.

The state has other, less drastic, means to accomplish its ends if it wishes to protect minority parties and small geographic subdivisions of major parties. Section 332 of the New York Election Law provides that the party enrollment of a voter may be challenged by any fellow party member and cancelled by a Justice of the State Supreme Court upon the determination of the Chairman of the County Committee of the party in the county in which

¹ Each of these cases involved the attempted takeover of a party organization by adherents of another party. In each case, they were almost successful. Nevertheless, it is to be noted that the enrollment box system was in effect throughout the period during which these cases arose, and that that system in no way prevented hundreds of determined voters from organizing prior to the last general election and changing their party enrollments so as to be able to "raid" the other party. All of these cases arose when the enrollments of the raiders were challenged by bona fide party members.

Opinion of Chief Judge Mishler

the challenged voter is enrolled that the voter is not in sympathy with the principles of the party.

That such procedure is highly effective, even on extremely short notice before a primary, is attested to by the results in the three state court cases cited above, *Zuckman*, *Werbelt*, and *Newkirk*. Each of those cases involved challenges to the enrollment of party members. Each case involved an attempted takeover of one party by members of another. Challenges in each of the three cases were successful.

Such a proceeding, then, is sufficient to protect the permissible interests of the state. The challenge procedure may involve the expenditure of more time and effort on the part of state officials, but New York may not "deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington v. Rash*, *supra*, 380 U.S. at 96, 85 S.Ct. at 780.

The explicit and comprehensive criminal sanctions for various violations of the elective franchise provided for in Article 16 of the Election Law, §420 et seq., further buttress the state's ability to protect the integrity of its political parties and election procedures.

Defendants also argue that plaintiffs have waived their constitutional right to vote in the primaries, or are estopped from asserting it, by reason of their failure to enroll prior to the last general election. In dealing with fundamental constitutional rights like the right to vote, the Supreme Court has said: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (Footnote omitted). *Brady v. United States*, 397 U.S. 742, at 748, 90 S.Ct. 1463, at 1469 (1970). See also *Brookhart v. Janis*,

Opinion of Chief Judge Mishler

384 U.S. 1, 4, 86 S.Ct. 1245 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).*

Bearing in mind the principles of these cases and the importance of the rights in question, this Court cannot say that there has been any waiver in this case. Plaintiffs remain free to assert their rights in court, and are not barred from doing so by any asserted waiver or estoppel.

II. FIRST AMENDMENT

The right to vote is inextricably tied to the right of free expression and the related right of free association. The right to vote is meaningless unless accompanied by the opportunity to exchange ideas and opinions.

Plaintiffs further contend that the "waiting period" imposed by New York's statutory scheme between their initial attempts to enroll in a political party and their final acceptance as party members violates their right to freely associate with the party of their choice for the advancement of their political aims and ideals. As such, they maintain, the enrollment box system violates the First Amendment.

The Court agrees. The system is an unconstitutional infringement by the state of rights guaranteed by the First and Fourteenth Amendments to the Constitution. Absent a compelling state interest, no state may impose onerous burdens on the right of individuals to associate

* Although these principles were announced in criminal cases, it can hardly be said that the rights of voting, free expression, and free association are any less fundamental and sacred than the rights reserved to those accused of crimes. These rights ought not lightly to be considered forfeited. It is perhaps most important that a right not need burdensome administrative renewal when the critical nature of a current situation sparks a citizen to speak out. See, e.g. *Beare v. Smith*, 321 F. Supp. 1100 (1970) (Three Judge Court).

Opinion of Chief Judge Mishler

for the advancement of political beliefs and the right of qualified voters to cast their votes effectively. *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968).

The effect of New York's enrollment laws is to postpone plaintiffs' right to associate with members of the political party of their choice and to participate in the affairs of that party. They are denied the right to vote in primary elections, to sign designating petitions, to become regular designees of the party for public office, or to become candidates for party office, until the enrollment box is unlocked and they are enrolled. The citizen who moves into another county after a general election, or who switches party loyalty or who only later decides to take an interest in party affairs is denied the right to associate with others of the same political views for an unreasonable length of time.

Several formulations of the test that alleged infringements of First Amendment rights must satisfy to uphold their constitutionality have been advocated of used by the courts. These include "balancing" of interests, the absolute standard, "less drastic means," and the "compelling interest" test.

"Balancing" would involve weighing the governmental interest in the purpose of the statute in question against the First Amendment rights alleged to be infringed. In *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419 (1967), however, the Supreme Court expressly declined to use such a test. In striking down an overbroad federal statute, the Court stated:

We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are

Opinion of Chief Judge Mishler

at stake. The task of writing legislation which will stay within those bounds has been committed to Congress. Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms." *Shelton v. Tucker*, *supra*. 88 S.Ct. at 425-26, 389 U.S. 267-69, and see also fn. 20.

Nor is it certain that *Robel*, *supra*, *Boorda v. Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969), *cert. den.* 397 U.S. 1042 (1970), and *Williams v. Rhodes*, *supra* (concurring opinion of Mr. Justice Douglas) have held that direct restraints on free association are absolutely invalid. It appears that *Robel* was applying the "less drastic means" test of *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247 (1960). In overturning a state statute requiring teachers to disclose their every associational tie, the *Shelton* court stated:

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.¹ The breadth of legislative abridgment must be viewed in the light of *less drastic means* for achieving the same basic purpose. 364 U.S. 479, 488, 81 S.Ct. 247, 252. (emphasis supplied, footnote omitted).

Another line of cases has settled upon the "compelling state interest" test whenever it is alleged that state action

Opinion of Chief Judge Mishler

infringes First Amendment rights protected through the Due Process Clause of the Fourteenth Amendment. In *NAACP v. Alabama*, a state statute requiring the NAACP to produce its records including the names of its members was held unconstitutional. In determining whether Alabama had demonstrated an interest in obtaining the information sufficient to justify the deterrent effect which the disclosures might have on associational rights, the Court said, "Such a ' . . . subordinating interest of the State must be compelling,' *Sweezy v. New Hampshire*, 354 U.S. 234, 265, 77 S.Ct. 1203, 1219, 1 L.Ed.2d 1311 (concurring opinion)." 357 U.S. 449, 463, 78 S.Ct. 1163, 1172 (1958).

This development was continued in *Bates v. City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412 (1960), and *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328 (1963), and culminated in *Williams v. Rhodes*, *supra*. In the latter case, Ohio election laws were challenged that made it very difficult for a new political party to be placed on the state ballot to choose electors pledged to particular candidates for President and Vice President. In language that aptly describes the present case also, Justice Douglas stated:

Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. 393 U.S. 23, 39, 89 S.Ct. 5, 15 (concurring opinion).

Speaking for the Court, Mr. Justice Black said:

In the present situation the state laws place burdens on two different, although overlapping, kinds of right

Opinion of Chief Judge Mishler

—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank high among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment.⁶ And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.⁷ 393 U.S. 23, 30-31, 89 S.Ct. 5, 10 (footnotes omitted).

In determining whether Ohio had the power to place substantially unequal burdens on both the right to vote and the right to associate, the Court reaffirmed that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." (citing *NAACP v. Alabama, supra*).⁸

Thus, First Amendment freedoms are within the state's power to limit and regulate only when the state has a compelling state interest that is served by that regulation. Furthermore, there must be a "substantially relevant connection" between the state's compelling interest and the means that are chosen to effect the regulation. *Shelton v.*

⁶ Although Justice Harlan specifically limited his concurrence to the proposition that Ohio's statutory scheme violated the basic right of political association assured by the First Amendment which is protected against state infringement under the Due Process Clause of the Fourteenth Amendment, it now appears that the Supreme Court has fixed upon the compelling state interest test to test alleged infringements of the right to vote and of First Amendment rights on either Due Process or Equal Protection grounds.

Opinion of Chief Judge Mishler

Tucker, supra, 364 U.S. 449, 485, 81 S.Ct. 247, 250. This is essentially saying that the State must utilize the least drastic means available to effect its legitimate interest. If the state fails to prove either that its interest is compelling or that the means chosen are the least drastic means possible, the regulation must fall as an overbroad infringement of the First Amendment right.

As outlined above, the Court finds that the state has failed to prove that it has a compelling interest in the values that the enrollment box system was designed to protect, and that even if it had such a compelling state interest, it has not utilized the least drastic means. The challenge procedures and the criminal sanctions outlined in the Election Law are certainly less drastic, and there is no reason to believe that they would not protect whatever interest the State of New York claims to have in the maintenance of "party integrity."

III. THE VOTING RIGHTS ACT OF 1965 AND THE 1970 AMENDMENTS

Section 1973aa-1 of the Voting Rights Act of 1965, (Pub. L. 89-110, 79 Stat. 437, 42 U.S.C.A. §1973, and the Amendments of 1970, Pub. L. 89-110, Title II, §201, as added Pub. L. 91-285, §6, 84 Stat. 315, 42 U.S.C.A. §1973aa) provides:

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; . . .

Opinion of Chief Judge Mishler

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President or Vice President in such election;¹⁰

Defendant's argument that the Voting Rights Act has no application to "primary voting for presidential nominating conventions," is answered in the text of the Act." 42 U.S.C. §19731(c)(1) provides:

(c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any

¹⁰ The Twenty-sixth Amendment to the Constitution has also brought about a change in voter qualifications by lowering the voting age in all elections to 18. It does not appear that New York has as yet enacted statutory provisions to put these changes into effect, but compliance with the age requirement and the residency requirement (for the actual presidential elections) is evidently proceeding by means of instructions from the Secretary of State to the election boards.

¹¹ The legislative history shows that the Act was intended to apply to primary elections and particularly elections of delegates to party conventions. House Report No. 439, in explanation of the Definitions Section of the Voting Rights Act [42 U.S.C. §19731(c)(1)] states:

Clause (1) of this subsection contains a definition of the term "vote" for purposes of all sections of the act. The definition makes it clear that the act extends to all elections—Federal, State, local, primary, special or general—and to all actions connected with registration, voting, or having a ballot counted in such elections. The definition also states that the act applies to elections of candidates for "party" offices. Thus, for example, an election of delegates to a State party convention would be covered by the act. . . . U.S. Code Cong. & Admin. News 2464 (1965).

The Conference Committee adopted the House version of Subsection 14(c)(1). *Id.* at 2582.

Opinion of Chief Judge Mishler

primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election. (Emphasis supplied).

As stated earlier, delegates to the national nominating conventions will be elected in New York's June primary. These delegates are the direct link between the interests and opinions of the voters in the primary and the national candidates and platform selected at the national nominating conventions. In order for a voter to effectively participate in the selection process, he must be able to cast his vote in the primary also. It seems intuitively obvious to even the most casual observer that to deny or encumber the right to participate in primary elections is to restrict the right to participate in an integral and essential part of the electoral process.

It also needs little explanation that the waiting period mandated by the enrollment box system before an enrollment can become effective is a durational residency requirement.¹² This residency requirement may vary in duration from one to eleven months, depending on the time of year the enrollment blank is filled out and put in the box (registration and signing of enrollment blanks are closed during the thirty days before and after the general election). It is a durational residency requirement imposed

¹² It is noted that absentee balloting is not available in primary elections.

Opinion of Chief Judge Mishler

in addition to the ninety days residence required to vote in a general election.¹³

The seven months' additional residence required of those voters who would be otherwise qualified to vote in the June primary constitutes a durational residence requirement as a precondition to voting for President and Vice President in excess of the thirty days allowed by the Voting Rights Act. As thus applied, the law is invalid. Const. Art. VI.

It might be noted that the constitutionality of the 1970 Amendments was challenged in *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970). A divided (5-4) Court found that the 18-year-old vote provisions of the Amendments are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections. The literacy test provisions were unanimously upheld, and the Court, by a vote of 8-1, held that Congress could set residency requirements and provide for absentee balloting in elections for presidential and vice presidential electors.

However, it is clear that the Supreme Court did not pass on the application of the Amendments, by the literal terms of the Act, to a primary election at which the delegates to the national nominating conventions would be elected. This Court must assume the constitutionality of the Act and its amendments until it is decided otherwise.

¹³ Section 150 provides in part that

"[a] qualified voter is a citizen who is or will be on the day of election twenty-one years of age or over, and shall have been a resident of this state, and of the county, city or village for three months next preceding an election and has been duly registered in the election district of his residence. . . ." See footnote 10, *supra*.

Opinion of Chief Judge Mishler

IV. SUMMARY OF PRIOR PROCEEDINGS

The plaintiff initially moved for the convening of a three-judge court pursuant to 28 U.S.C. §2281, *et seq.* The defendants moved to dismiss the complaints pursuant to Rules 12(b) and 12(c) of the Rules of Civil Procedure. As previously noted, the plaintiffs withdrew the application to convene a three-judge court.

V. CONCLUSION

Defendants' motion to dismiss pursuant to Rules 12(b) and 12(c) is denied. Judgment is granted in favor of the plaintiffs and against the defendants declaring §186 of the Election Law of the State of New York unconstitutional. The Clerk is ordered to enter judgment accordingly.

JACOB MISHLER
U.S.D.J.

Judgment of the District Court
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[CAPTIONS OMITTED
in 71C 1573 and 71C 1621]

These actions having been consolidated by the court and the court having by memorandum of decision dated this day determined that §186 of the Election Law of the State of New York contravenes the First and Fourteenth Amendments to the Constitution and is violative of the Voting Rights Act of 1965 as amended, insofar as it pertains to the June 1972 primary to be held in the State of New York, it is

ORDERED, ADJUDGED and DECREED that plaintiffs have judgment against the defendants declaring §186 of the Election Law of the State of New York unconstitutional and violative of the Voting Rights Act of 1965 as amended.

Dated at Brooklyn, New York, this 10th day of February, 1972.

LEWIS ORGEL
Clerk of the Court

Approved and Ordered that
it be entered

JACOB MISHLER
U.S.D.J.

**Decision and Order of District Court Denying
Motions for Stay and Reargument**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 71-C-1573

PEDRO J. ROSARIO, *et al.*,

Plaintiffs,

—against—

NELSON ROCKEFELLER, etc., *et al.*,

Defendants.

No. 71-C-1621

STEVEN EISNER, etc.,

Plaintiffs,

—against—

NELSON ROCKEFELLER, etc., *et al.*,

Defendants.

MEMORANDUM OF DECISION AND ORDER

February 17, 1972

The defendants, by order to show cause, move to reargue the decision of this court and the order entered thereon made and dated February 10, 1972 on the grounds of (1) lack of jurisdiction of a single district judge to declare

Decision and Order of the District Court

§186 unconstitutional, and (2) abuse of discretion in granting declaratory judgment.

The court did not overlook the issue now raised. The decision made reference to the withdrawal of the motion for the convening of a three judge district court and noted that plaintiffs had withdrawn their application for that relief. Because of what had transpired, as will be hereinafter described, the court assumed that the parties agreed that a single judge district court would pass on the issue of the unconstitutionality of §186 of the Election Law of the State of New York.

The Rosario complaint prayed for (1) convening a three-judge district court, (2) declaring §186 unconstitutional and (3) granting "plaintiffs appropriate equitable relief to assure their participation in the 1972 primary elections scheduled for June 1972".

On December 6, 1971, the day of the filing of the complaint, an order was signed directing the defendants to show cause why a three-judge district court should not be convened pursuant to 28 U.S.C. §2281. The motion was returnable on December 17, 1971. In the meantime and on December 15th, Eisner filed a complaint praying that the court declare §§117 and 186 of the Election Law of the State of New York unconstitutional and praying for appropriate equitable relief to enforce "plaintiff's right to participate in the New York State Presidential Primary scheduled for June 20, 1972". A motion was made for a three-judge district court returnable on December 17, 1971. Defendants served a notice of motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief may be granted. [Rules 12(b)(1), 12(b)(6) and 12(c)].

Decision and Order of the District Court

On the return day of all the motions, i.e., December 17, 1971, there was discussion in open court among Seymour Friedman, attorney for plaintiffs Rosario, et al., Burt Neuborne, attorney for plaintiff Eisner, et al., A. Seth Greenwald, an Assistant Attorney General of the State of New York, J. Kemp Hannon, an attorney representing the Nassau County Board of Elections and J. Lee Rankin (by Mr. Gensler), representing The City of New York, concerning the advisability of convening a three-judge district court in the light of the time schedule for appellate review prior to June 20, 1972.

In *Bachrow v. Rockefeller*, 71-C-930, a three judge district court on September 8, 1971 dismissed a challenge to §186 for mootness.¹ The same lawyers participated in *Bachrow*. The undersigned was a member of the three judge district court.

Since Christmas vacations were about to commence and a delay in convening a three judge district court was a possibility, all the lawyers agreed that a more expeditious appellate review could be realized if the determination on the constitutionality of §186 were determined by the undersigned as a single district court judge. Thereupon the plaintiffs agreed to withdraw their request for injunctive relief. The Court wrote an order to that effect which stated that the action is "solely one for declaratory judg-

¹ In its memorandum of decision, the court, noting the difficulty in securing a determination, cited the dissenting opinions in *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 20 (1969) in the following language:

"Although the time periods involved may make it difficult to secure a decision and review of any given situation before a specific election takes place (see the dissenting opinions in *Hall v. Beals*, *supra*), it does not seem that a diligent plaintiff would find such a task impossible."

Decision and Order of the District Court

ment". Messrs. Friedman, Greenwald and Gersler signed their consent to that order.²

Thereafter briefs were served and filed by all the parties. The constitutional points were argued in the briefs. None of the parties argued the question of jurisdiction. The defendants now argue that the stipulation does not "amount to a consent on the part of the defendants above to jurisdiction or the propriety of the granting of a sweeping declaratory judgment by a single judge in a case of this nature." (Defendants' Memorandum of Law, p. 1)

The parties cannot confer jurisdiction on this court. The power of the court to act cannot therefore be based upon the consent of the defendants. Rather, the court has recounted the history of this proceeding as an answer to the defendants in charging an abuse of discretion in deciding this case as a single district court judge. The defendants' claim of an abuse of discretion in granting a declaratory judgment as provided in 28 U.S.C. §2201 is rejected in view of the conduct of the defendants' counsel described herein at length.

² The consent reads as follows:

12/17/71

" On consent of the parties hereto the prayer for relief is amended by eliminating paragraph (3) of the prayer for relief and the action is solely one for declaratory judgment.

SO ORDERED

s/ Jacob Mishler
U.S.D.J.

Consent

s/ Seymour Friedman

J. Lee Rankin, Corp. Counsel

s/ by Att Gersler

Louis J. Lefkowitz by

s/ A. Seth Greenwald

Decision and Order of the District Court

The power of a single-judge district court to determine constitutional questions is stated in *Rosado v. Wyman*, 397 U.S. 397, 402; 90 S.Ct. 1207, 1212-13, as follows:

"Jurisdiction over federal claims, constitutional or otherwise, is vested exclusively or concurrently, in the federal district courts. Such courts usually sit as single-judge tribunals."

The district court is a court of limited jurisdiction. Jurisdiction to decide questions involving the deprivation of civil rights granted under the Constitution is found in 28 U.S.C. §1343.^a

The power to decide constitutional questions in the first instance is in the federal district court. Congress has seen fit to limit that power by denying a single judge the right to issue "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . ." (28 U.S.C. §2281).

The defendants would extend that limitation to an action for declaratory judgment where the effect of that judgment would be identical to that of an injunction. *Rosado v. Wyman*, 304 F.Supp. 1350, 1352 (E.D.N.Y. 1969), [Weinstein, D.J.].

^a The pertinent portion of 28 U.S.C. §1343 recites:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948, c. 646, 62 Stat. 932."

Decision and Order of the District Court

Chief Judge Lumbard's concurring opinion in *Rosado v. Wyman*, 414 F.2d 170, 184 (2d. Cir. 1970), made the following observation with reference to the same issue:

"That the state statute could be held unconstitutional in a declaratory ruling by the single judge seems settled. See ALI Study of the Division of Jurisdiction Between State and Federal Courts 245 (Tent. Draft No. 6, 1968), recommending that such a declaratory judgment requires a three-judge court but noting: [T]he requirement is here extended to cases seeking only a declaratory judgment, a remedy which was unknown in 1910. Three judges are not now needed in such a case. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154-55, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Flemming v. Nestor*, 363 U.S. 603, 606-607, 80 S.Ct. 1367, 4 L.Ed. 2d 1435 (1960).

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554 (1963) defined the power of a single district court judge to declare a federal statute unconstitutional.⁴ In *Mendoza-Martinez*, the plaintiff brought an action in the district court seeking to have §401(j) of the Nationality Act of 1940 declared unconstitutional. That act deprived a citizen, who remained out of the country for the purpose of avoiding the draft, of his citizenship. The Court said:

"The present action, which in form was for declaratory relief and which in its agreed substance did not contemplate injunctive relief, involves none of the dangers to which Congress was addressing itself. The

⁴ 28 U.S.C. §2282 places the same limitation on the power of a single district court judge with reference to the enforcement, operation or execution of any Act of Congress as 28 U.S.C. §2281 places on the power with relation to any state statute.

Decision and Order of the District Court

relief sought and the order entered affected an Act of Congress in a totally non-coercive fashion. There was no interdiction of the operation at large of the statute. It was declared unconstitutional, but without even an injunctive sanction against the application of the statute by the Government to Mendoza-Martinez. Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute. That being the case, there is here no conflict with the purpose of Congress to provide for the convocation of a three-judge court whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained. Thus there was no reason whatever in this case to invoke the special and extraordinary procedure of a three-judge court." 372 U.S. at 155, 83 S.Ct. at 560-61.^{*}

Were the court to accept the defendants' argument, then the result would be that no single judge district court would have the power to entertain an action for a judgment declaring any statute unconstitutional. The restraining effect of a declaratory judgment which defendants describe would be present in every case to a greater or lesser de-

^{*} The Circuits have generally understood *Mendoza-Martinez* to approve the power of a single district judge to declare statutes unconstitutional. See, *Merced Rosa v. Herrero*, 423 F.2d 591 (1st Cir. 1970); *United States v. Southern Ry. Co.*, 380 F.2d 49 (4th Cir. 1967); *Wilson v. Gooding*, 431 F.2d 855 (5th Cir. 1970); *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970); *Sellers v. Regents of the University of California*, 432 F.2d 493 (9th Cir. 1970); But See *Jeannette Rankin Brigade v. Chief of the Capitol Police*, 421 F.2d 1090 (D.C. Cir. 1969) [Bazelon, C.J., dissenting]. See criticism of *Mendoza-Martinez* in *Currie, The Three-Judge District Court in Constitutional Litigation*, 32 U. Chicago L. Rev. 1 (1964).

Decision and Order of the District Court

gree, since statutes are of a wide, general application and must necessarily have an effect beyond the parties to the litigation.

The Congress may further limit the power of a single district judge by denying them the right to declare state or federal statutes unconstitutional. It has not seen fit to do so.

This court has the power to declare §186 unconstitutional and finds it appropriate to exercise such power in this case.

The motion to re-argue is in all respects denied, and it is

So ORDERED.

JACOB MISHLER
U.S.D.J.

**Notice of Appeal in *Rosario* Filed on Behalf
of Attorney General of New York**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71 C 1573]

SIRs :

NOTICE is hereby given that Nelson Rockefeller, Governor of the State of New York and John P. Lomenzo, Secretary of State of the State of New York, hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment entered February 10, 1972 declaring § 186 of the Election Law of New York unconstitutional and from each and every part of said judgment.

**Dated: New York, New York
February 17, 1972**

Notice of Appeal in Rosario on Behalf of Attorney General

Yours, etc.,

LOUIS J. LEFKOWITZ

Attorney General of the

State of New York

Attorney for Defendants

Rockefeller and Lomenzo Pro Se

Pursuant to Executive Law § 71

Office and P. O. Address

80 Centre Street

New York, New York 10013

By: A. SETH GREENWALD

Assistant Attorney General

488-3396

To:

SEYMOUR FRIEDMAN, Esq.

26 Court Street

Brooklyn, New York 11201

J. LEE RANKIN

Corporation Counsel

Municipal Building

New York, New York 10007

**Notice of Appeal in *Eisner* Filed on Behalf
of Attorney General of New York**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71 C 1621]

SIRS:

NOTICE is hereby given that Nelson Rockefeller, Governor of the State of New York and John P. Lomenzo, Secretary of State of the State of New York, hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment entered February 10, 1972 declaring § 186 of the Election Law of New York unconstitutional and from each and every part of said judgment.

Dated: New York, New York
February 17, 1972

Yours, etc.,

Notice of Appeal in Eisner on Behalf of Attorney General

LOUIS J. LEFKOWITZ

Attorney General of the

State of New York

Attorney for Defendants

Rockefeller and Lomenzo Pro Se

Pursuant to Executive Law § 71

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Assistant Attorney General

488-3396

To:

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New York Civil Liberties Union

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New York, New York 10011

JOSEPH JASPAN

Nassau County Attorney

County Executive Building

Mineola, New York 11501

Att: J. KEMP HANNON

**Notice of Appeal in *Eisner* Filed on Behalf of
Commissioners of Elections for Nassau County**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[CAPTION OMITTED
IN 71 C 1621]

SIRS :

NOTICE is hereby given that William D. Meisser and Marvin D. Cristenfeld, Commissioners of Elections for the Board of Elections of Nassau County, hereby appeal to the United States Court of Appeals for the Second Circuit from a judgment entered February 10, 1972, declaring § 186 of the Election Law of New York unconstitutional and from each and every part of said judgment.

Dated: Mineola, New York
February 18, 1972

*Notice of Appeal in Eisner on Behalf of Commissioners
of Elections, Nassau County*

Yours, etc.

JOSEPH JASPER

*County Attorney of Nassau County
Attorney for Defendants*

*William D. Meisser and Marvin D.
Cristenfeld, Commissioners of Elec-
tions for Nassau County*

*Nassau County Executive Building
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By J. KEMP HANNON

*Deputy County Attorney
(516) 535-3603*

To:

HON. LOUIS J. LEFKOWITZ

*Attorney General of the State of New York
Attorney for Defendants*

Rockefeller and Lomenzo Pro Se

Pursuant to Executive Law § 71

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New York, N. Y. 10013

BURT NEUBORNE, Esq.

New York Civil Liberties Union

Attorney for Plaintiff

84 Fifth Avenue

New York, N. Y. 10011

**Order of Second Circuit Staying Decision of
District Court and Scheduling an Expedited Appeal**

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of February, one thousand nine hundred and seventy-two.

[CAPTIONS OMITTED]

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated February 18, 1972, for a stay and for a preference be and it hereby is granted.

It is further ordered that the argument of the appeal is set for Thursday, February 24, 1972; that all parties may file papers in typewritten form and that the appellant shall file three copies of all necessary parts of the record.

A. DANIEL FUSARO
Clerk

Before:

HON. HAROLD R. MEDINA
HON. J. EDWARD LUMBARD
HON. WILLIAM H. MULLIGAN
Circuit Judges

**Opinion of Second Circuit Holding Section 186
Constitutional**
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 632, 633—September Term, 1971.

(Argued February 24, 1972 Decided April 7, 1972.)

Docket Nos. 72-1182-83

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
GOTTESMAN, individually and on behalf of all others
similarly situated,

Plaintiffs-Appellees,

NELSON ROCKEFELLER, Governor of the State of New York,
JOHN P. LOMENZO, Secretary of State of the State of
New York,

Defendants-Appellants,

MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLER
and J. J. DUBERSTEIN, constituting the Board of Elec-
tions in The City of New York,

Defendants.

STEVEN EISNER, on his own behalf and
on behalf of all others similarly situated,

Plaintiffs-Appellees,

NELSON ROCKEFELLER, Governor of the State of New York;
JOHN P. LOMENZO, Secretary of State of New York,
WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD,
Commissioners of Elections for Nassau County,

Defendants-Appellants.

*Opinion of Second Circuit***Before :****LUMBARD, MANSFIELD and MULLIGAN,***Circuit Judges.*

Appeal from a decision in the Eastern District of New York, Mishler, J., declaring New York Election Law §186 unconstitutional on grounds that it violated plaintiffs' First and Fourteenth Amendment rights and that it was in conflict with 42 U.S.C. §1973aa-1(d).

Reversed.

SEYMOUR FRIEDMAN, Brooklyn, New York, for *Plaintiffs-Appellees Pedro J. Rosario, William J. Freedman and Karen Lee Gottesman, et al.*

A. SETH GREENWALD, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York and Irving Galt, on the brief), for *Defendants-Appellants Nelson Rockefeller and John P. Lomenzo and Pro Se pursuant to New York Executive Law §71.*

BURT NEUBORNE, New York Civil Liberties Union, Brooklyn, New York (Arthur Eisenberg, on the brief), for *Plaintiffs-Appellees Steven Eisner, et al.*

J. KEMP HANNON (Joseph Jaspan, County Attorney of Nassau County, Mineola, New York, on the brief), for *Defendants-Appellants William D. Meissner and Marvin D. Christenfeld.*

Opinion of Second Circuit

LUMBARD, Circuit Judge:

Defendants below, New York State officials charged with enforcing section 186 of the New York Election Law which provides that voters in primary elections must have been enrolled in the party prior to the previous general election, appeal from Chief Judge Mishler's decision in the Eastern District declaring section 186 unconstitutional as a violation of plaintiffs' rights under the First and Fourteenth Amendments and the federal Voting Rights Act, 42 U.S.C. §1973, as amended 42 U.S.C. §1973aa. We reverse.

Section 186 is part of New York's comprehensive regulation of its electoral processes and, in particular, of its party primary elections. By law only enrolled party members can vote in their party's primary. New York Election Law §201. Section 186 is designed to ensure the integrity of the closed primary and provides that enrollment in a party for the purpose of voting in a primary election must take place prior to the general election previous to the primary.¹ The

¹ Section 186 provides:

§186. Opening of enrollment box and completion of enrollment

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circle or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall

Opinion of Second Circuit

theory behind the statute is that such early enrollment will discourage "raiding," i.e., voters of one party fraudulently designating themselves as voters of another party in order to determine the results of the raided party's primary.

Plaintiffs here, all registered voters, failed to enroll as party members prior to the November 1971 general elections. The effect of section 186 is to exclude them from voting in the 1972 primary elections. Invoking the jurisdiction of the federal courts under 42 U.S.C. §1983, 28 U.S.C. §1343(3), §2281, and §2284, plaintiffs sought the convening of a three-judge court and requested declaratory and injunctive relief against the enforcement of section 186. Subsequently, they dropped their demand for injunctive relief, and, concomitantly, their request for a three-judge court.² The district court granted the requested de-

not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year.

² Defendants have argued that the district court had no power to refuse to convene a three-judge court even though plaintiffs had withdrawn their demand for injunctive relief. We disagree. The Supreme Court has said that section 2281 is not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." *Phillips v. United States*, 312 U.S. 246, 251 (1941). Following this doctrine the Court has carefully differentiated between suits in which declaratory relief is requested and a three-judge court is not appropriate and those in which injunctive relief is requested and a three-judge court is required. *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Since plaintiffs abandoned their claim for injunctive relief at the district court level and prior to the trial, the district judge quite properly determined the issue. See *Merced Ross v. Herrero*, 423 F.2d 591, 593 (1st Cir. 1970).

Opinion of Second Circuit

claratory relief on three grounds: that section 186 violated plaintiffs' Fourteenth Amendment rights to equal protection because raiding can be equally well or better prevented by New York Election Law §332 which provides for direct challenges to allegedly fraudulent enrollments, yet under which plaintiffs would not be kept from voting; that section 186 infringed the plaintiffs' First Amendment rights of association with other party members, yet advanced no compelling state interest, or failed to do so by the least drastic means; and that section 186 was in direct conflict with the federal Voting Rights Act §1973aa-1(d) which provides "each State shall provide by law for the registration . . . of all duly qualified residents . . . not later than thirty days immediately prior to any presidential election." We disagree.

The political parties in the United States, though broad-based enough so that their members' philosophies often range across the political spectrum, stand as deliberate associations of individuals drawn together to advance certain common aims by nominating and electing candidates who will pursue those aims once in office. The entire political process depends largely upon the satisfactory operation of these institutions and it is the rare candidate who can succeed in a general election without the support of the party. Yet the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—would be seriously impaired were members of one party entitled to interfere and participate in the opposite party's affairs. In such circumstances, the raided party would be hard-pressed to put forth the candidates its members deemed most satisfactory. In the end, the chief loser would be the public.³

³ New York has a particular interest in preventing raiding. In addition to the major parties, Democrat and Republican, two minority parties,

Opinion of Second Circuit

Section 186 is part of New York's scheme to minimize the possibility of such debilitating political maneuvers. Designed to prevent primary crossover votes cast only to disrupt orderly party functioning, the statute requires that enrollment in the party be completed by a date sufficiently prior to the primary to decrease the likelihood of raiding. The Supreme Court has made clear that "prevention of [electoral] fraud is a legitimate and compelling government goal." *Dunn v. Blumstein*, 40 U.S.L.W. 4269, 4274 (March 21, 1972). "[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Bullock v. Carter*, 40 U.S.L.W. 4211, 4215 (Feb. 24, 1972). And a candidacy determined by the votes of non-party members for purposes antagonistic to the functioning of the primary system is, in practical effect, a fraudulent candidacy. Given the importance of orderly party primaries to the political process, we hold that the prevention of "raiding" is a compelling state interest.'

Conservative and Liberal, are established throughout the state and usually present a full slate of candidates in the general election. Yet as there are only 107,000 enrolled Conservatives and 109,000 enrolled Liberals as opposed to 2,950,000 enrolled Republicans and 3,565,000 enrolled Democrats, successful raiding of these minority parties would present little difficulty on a state-wide basis absent §186.

- 4 Restrictions on the exercise of the franchise, dealing as they do with the fundamental rights of voting and association have been closely scrutinized by the courts; e.g., *Dunn v. Blumstein*, 40 U.S.L.W. 4269 (March 21, 1972); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *William v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); and primaries as well as general elections have been subjected to this exacting scrutiny, e.g., *Bullock v. Carter*, 40 U.S.L.W. 4211 (Feb. 24, 1972); *Smith v. Allwright*, 321 U.S. 469 (1944); *United States v. Classic*, 313 U.S. 299 (1941).

Applying this standard to our review of section 186, we find that the statute advances a compelling state interest and that it does so in a manner calculated to impinge minimally on First and Fourteenth Amendment rights.

Opinion of Second Circuit

Moreover, section 186 is carefully designed to infringe minimally on First and Fourteenth Amendment rights. The statute works indirectly to its end of having only voters in general sympathy with the party vote in that party's primary. By requiring enrollment some seven to nine months prior to the primary and also prior to the general election, it takes full advantage of the facts that long-range planning in politics is quite difficult and that neither politician nor voter wishes to give the impression that he is deliberately engaging in fraud. Thus the notion of raiding, its potential disruptive impact, and its advantages to one side are not likely to be as apparent to the majority of enrolled voters nor to receive as close attention from the professional politician just prior to a November general election when concerns are elsewhere as would be true during the "primary session," which, for the country as a whole, runs from early February until the end of June. Few persons have the effrontery or the foresight to enroll as say, "Republicans" so that they can vote in a primary some seven months hence, when they full well intend to vote "Democratic" in only a few weeks. And, it would be the rare politician who could successfully urge his constituents to vote for him or his party in the upcoming general election, while at the same time urging a cross-over enrollment for the purposes of upsetting the opposite party's primary. Yet the operation of section 186 requires such deliberate inconsistencies if large-scale raiding were to be effective in New York. Because of the statute, it is all but impossible for any group to engage in raiding. Allowing enrollment any time after the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another.

Opinion of Second Circuit

Plaintiffs have argued, however, that even if the effectiveness of section 186 as a deterrent on raiding be established, still the statute must be struck down for it also keeps from voting in a primary the registrant who has only inadvertently failed to enroll prior to the general election and who has no intention of "raiding" one of the parties. Plaintiffs argue that section 332 of the Election Law which allows for a direct challenge to enrollees would be sufficient to accomplish the antiraiding purpose of section 186 and would, at the same time, allow the nonraiding late enrollee to vote in the primary. While it is true that section 186 and section 332 are aimed at the same evil of raiding, it is obvious that the use of 332 to prevent raiding would be far too cumbersome to have any deterrent effect on raiding in a primary. *Cf. Bullock v. Carter*, 40 U.S.L.W. 4211, 4214 (Feb. 24, 1972).

Section 332 is a narrowly drawn statute appropriate for striking from the enrollment rolls only one name at a time. Each such challenge requires a full judicial inquiry, with its high cost in money, time and manpower for the challenging party. Its efficacy, even in the single case is not clear for proof of a man's allegiance to one party or another is often difficult to secure. Unlike proof of residence, for which objective evidence, *e.g.*, ownership of a dwelling, car registration, or a driver's license, is easily at hand, proof of allegiance to one party or another demands inquiry into the voter's mind. The very great majority of voters have no closer contact with their political party than pulling the lever or marking the ballot in the voting booth. In the absence of the availability of evidence regarding a voter's party preference and faced with large-scale raiding, party officials relying only on section 332 would be virtually impotent. By contrast, section 186 has a broad deterrent effect. The burden of change is placed upon the raider not the party and the

Opinion of Second Circuit

statute requires the cross-over at a particularly difficult time. In requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means. We think section 186 is a proper means to safeguard a valuable state interest.⁵

We are supported in our conclusion by the Supreme Court's recent decision in *Lippitt v. Cipollone*, 40 U.S.L.W. 3334 (Jan. 17, 1972). There the Court affirmed without opinion a decision of the Northern District of Ohio declaring constitutional Ohio Rev. Code §3513.191 which provides "[n]o person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." Holding the statute constitutional the lower court found that it preserved "the integrity of all political parties and membership therein" by "prevent[ing] 'raiding' of one party by members of another party and [by] preclud[ing] candidates from '... altering their political party affiliations for opportunistic reasons.'" *Lippitt v. Cipollone*, 71-667 (N.D. Ohio, Nov. 5, 1971). The Supreme Court's affirmance indicates beyond dispute that the prevention of raiding is a compelling state interest and that a reasonable extended period of time before an enrollment can be changed is a proper means to halt this practice.⁶

5 New York does allow post-general election enrollment in certain cases. Section 187 of the Election Law allows late enrollment if, for example, the enrollee came of age after the past general election or if he was ill during the enrollment period. The import of section 187 is that New York is not opposed to later enrollment per se.

6 Defendants have argued that the Supreme Court's dismissal for want of a substantial federal question of a case ostensibly raising the same issues as the instant case, *Jordan v. Meisser*, 40 U.S.L.W. 3398 (Feb. 22, 1972), is controlling in this litigation. However, in *Jordan v. Meisser*, the New York Attorney General argued to the Court that the plaintiff

Opinion of Second Circuit

Plaintiffs' final argument is that section 186 is in direct conflict with 42 U.S.C. §1973aa-1(d) which provides: "each State shall provide by law for the registration . . . of all duly qualified residents . . . not later than thirty days immediately prior to any presidential election . . ." Plaintiffs argue that "presidential election" includes presidential primary. We disagree.

Section 1973aa-1(d) was passed as part of the Voting Rights Act of 1970. The statute itself makes no reference to primary elections speaking only of "voting for the offices of President and Vice President," §1973aa-1(a), or "vot[ing] for the choice of electors for the President and Vice-President," §1973aa-1(d) and the more usual meaning of "presidential election" is the quadrennial November election rather than the party primaries. On its face, then, the statute is not applicable to primary elections. The legislative history is silent on whether section 1973aa-1(d) was intended to apply to primaries. 1970 U.S. Cong. Code and Admin. News 3277, 3285. However, at the same time Congress enacted section 1973aa-1(d), it also passed into law section 1973bb reducing the voting age to eighteen in federal, state and local elections. See *Oregon v. Mitchell*, 400 U.S. 112 (1970). In so doing, Congress specifically addressed itself to "voting in any primary or in any election." 42 U.S.C. §1973bb. The deliberate inclusion of the word "primary" here coupled with its absence in section 1973aa is further indication that Congress was not dealing with primaries in section 1973aa. We conclude that section 1973aa has no application to this case.

Reversed.

Jordan had failed to utilize the provisions of section 187 of the New York Election Law under which he could have enrolled in a party after the general election in order to participate in the primary election. Section 187, however, allows post-general election enrollment only in narrowly-defined circumstances and none of the plaintiffs here has this alternate route of enrollment presently available to him.

**Judgment of Second Circuit Reversing District Court
in Rosario**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Courthouse in the City of New York, on the seventh day of
April one thousand nine hundred and seventy-two.

Present:

HON. J. EDWARD LUMBARD,
HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,

Circuit Judges.

[CAPTION OMITTED]

Appeal from the United States District Court for the
Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO

Clerk

**Judgment of Second Circuit Reversing District Court
in *Eisner***

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Courthouse in the City of New York, on the seventh day of
April one thousand nine hundred and seventy-two.

Present:

HON. J. EDWARD LUMBARD,

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. MULLIGAN,

Circuit Judges.

[CAPTION OMITTED]

Appeal from the United States District Court for the
Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO

Clerk

**Order Denying Motion to Stay Mandate and
Denying Petition for Rehearing in *Esner***

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[CAPTION OMITTED]

A petition for rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

J. EDWARD LUMBARD
WALTER R. MANSFIELD
WILLIAM H. MULLIGAN

April 24, 1972

**Order Denying Supplemental Petition for Rehearing
in *Eisner***

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[CAPTION OMITTED]

A supplemental petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said supplemental petition be and it hereby is **DENIED**.

J. EDWARD LUMBARO
(per WRM)

WALTER R. MANSFIELD

WILLIAM H. MULLIGAN

U. S. Circuit Judges

Dated: April 19, 1972

**Order Denying Petition for Rehearing in Banc
With Judges Feinberg and Oakes Dissenting**

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[CAPTION OMITTED]

A petition for rehearing and supplemental petition for rehearing both containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof.

Upon consideration thereof, it is

Ordered that said petitions be and they hereby are denied. Judges Feinberg and Oakes dissent.

HENRY J. FRIENDLY
Chief Judge

April 24, 1972

**Temporary Stay of Second Circuit Judgment
Issued by Mr. Justice Marshall**

SUPREME COURT OF THE UNITED STATES

No. A-1126
(No. 71-1371)

PEDRO J. ROSARIO, et al.,

Petitioners,

—v.—

**NELSON ROCKEFELLER, GOVERNOR OF THE
STATE OF NEW YORK, et al.**

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the judgment of the United States Court of Appeals for the Second Circuit in cases Nos. 72-1182 and 72-1183 be, and the same is hereby, temporarily stayed until the matter can be considered by the full Court.

THURGOOD MARSHALL
*Associate Justice of the Supreme
Court of the United States.*

Dated this 26th day of April, 1972.

Order Granting Certiorari But Denying Motion for Summary Reversal, Expedited Consideration and a Stay

The petition for a writ of certiorari is granted. The motion for summary reversal or, in the alternative, for expedited consideration on the merits is denied. Mr. Justice Stewart would expedite consideration on the merits.

The application for stay, presented to Mr. Justice Marshall and by him referred to the Court, is denied. Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall would grant the stay.

The motion of Lawyers for McGovern for leave to file a brief, as *amicus curiae*, is granted.

71-1371

COPY

Supreme Court of the United States

No. 71-1371 --- October Term, 1971

Pedro J. Rosario, et al.,

Petitioners,

v.

**Nelson Rockefeller, Governor of the State
of New York, et al.**

ORDER ALLOWING CERTIORARI. Filed May 30, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the **Second** Circuit is granted.

71-1371
~~LE COPY~~

FILED

APR 24 1972

MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. -----

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTMAN, individually and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT AND MOTION FOR SUMMARY
REVERSAL OR, IN THE ALTERNATIVE, FOR EX-
PEDITED CONSIDERATION ON THE MERITS**

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INDEX

PAGE

Motion for Summary Reversal or, in the Alternative, for Expedited Consideration on the Merits	1
Opinions Below	4
Jurisdiction	4
Questions Presented	4
Statutory Provisions Involved	5
Statement of the Case	6
The Operation of New York's Statutory Scheme	8
Reasons for Granting the Writ and for Summarily Re- versing the Decision of the Court Below	11
I. The Decision Below Is in Direct Conflict With Recent Decisions of This Court Protecting the Right to Vote	11
II. The Decision Below Is in Direct Conflict With Recent Decisions of This Court Invalidating State Action Impinging Upon the Right to Travel	17
III. The Decision Below Is in Direct Conflict With Recent Decisions of This Court Protecting the Freedom to Associate for the Advancement of Political Aims	19
IV. New York's Deferred Enrollment Scheme Which Conditions Full Participation in the 1972 Electoral Process Upon Past Participa- tion in the 1971 Electoral Process Is an Uncon- stitutional "Grandfather Clause" in Violation of the Fourteenth, Fifteenth, and Twenty-sixth Amendments	23

A. "Grandfather Clauses" and the Right to Vote	23
B. The Impact of New York's Statutory Scheme Upon Hitherto Unregistered Members of Racial Minorities	25
C. The Impact of New York's Statutory Scheme on Persons Having Recently Attained Voting Age	26
V. The Need for Expeditious Relief Herein	27
CONCLUSION	29

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit	1a
Opinion of the United States District Court, Eastern District of New York	11a

TABLE OF AUTHORITIES

Cases:

Alexander v. Todman, 337 F.2d 962 (3rd Cir.), <i>cert. den.</i> 380 U.S. 915 (1964)	13
Beare v. Smith, 321 F. Supp. 1100 (SD Texas, 1971)	12
Boorda v. Subversive Activities Control Board, 421 F.2d 1142 (D.C. Cir., 1969), <i>cert. den.</i> 397 U.S. 1042 (1970)	21
Bullock v. Carter, — U.S. —, 40 USLW 4211 (Feb. 24, 1972)	12
Carrington v. Rash, 380 U.S. 89 (1965)	11

Carter v. Dies, 321 F. Supp. 1358 (N.D. Tex., 1970), <i>aff'd sub nom. Bullock v. Carter</i> , — U.S. —, 40 USLW — (Feb. 24, 1972)	21
Cipriano v. City of Houma, 395 U.S. 701 (1969)	12
City of Phoenix v. Kolodziejewski, 399 U.S. 204 (1970)	12
Cottingham v. Vogt, 60 N.J. Super. 576, 160 A.2d 57 (N.J. Super. 1960)	25
Dunn v. Blumstein, — U.S. —, 40 USLW 4269 (Mar. 21, 1972)	12, 13, 14, 17, 18, 19, 20
Edwards v. California, 314 U.S. 160 (1941)	17
Evans v. Cornman, 398 U.S. 419 (1970)	12, 20
Gengeni v. Rosengard, 44 N.J. 166, 207 A.2d 665 (1965)	25
Goetsch v. Philhower, 60 N.J. Super. 582, 160 A.2d 60 (N.J. Super. 1960)	25
Guinn v. United States, 238 U.S. 347 (1915)	23, 24, 26
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	11-12
Jordan v. Meissner, — U.S. —, 40 USLW 3398 (Feb. 22, 1972)	18
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)	12, 20
Lane v. Wilson, 307 U.S. 268 (1939)	23, 24, 26
Lippitt v. Cippollone, — U.S. —, 40 USLW 3334 (Jan. 17, 1972)	14
NAACP v. Alabama, 357 U.S. 449 (1958)	19, 22
Oregon v. Mitchell, 400 U.S. 112	17
Passenger Cases, 7 How. 283 (1849)	17
Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark., 1968), <i>aff'd per curiam</i> 393 U.S. 14 (1968)	19, 22

Pontikes v. Kusper, — F. Supp. — (ND Ill. 1972)	13
Shapiro v. Thompson, 394 U.S. 618 (1969)	17
Shelton v. Tucker, 364 U.S. 479 (1960)	22
Socialist Worker's Party v. Rockefeller, 314 F. Supp.	
984 (SDNY), aff'd 400 U.S. 806 (1970)	11, 12
United States v. Robel, 389 U.S. 258 (1967)	19, 21, 22
Williams v. Rhodes, 393 U.S. 23 (1968)	12, 19, 20, 21

Constitutional Provisions:

United States Constitution

First Amendment	20, 21, 22
Fourteenth Amendment	11, 22, 23
Fifteenth Amendment	23, 24, 26
Twenty-sixth Amendment	23, 24, 26

Federal Statutes:

28 U.S.C. §1254(1)	4
42 U.S.C. §1973aa(1)	18

State Statutes:

New York State Election Laws

§136	12
§151	6
§173	9, 10
§174	9, 10, 15
§186	passim
§187	7, 18
§187(c)(6)	18
§332	9, 10, 16
§369	9, 10
§§385-389	9, 10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
GOTTESMAN, individually and on behalf of all others sim-
ilarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York,
JOHN P. LOMENZO, Secretary of State of The State of
New York, MAURICE J. O'ROURKE, JAMES M. POWER,
THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the
BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all
others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York,
JOHN P. LOMENZO, Secretary of State of The State of
New York, WILLIAM D. MEISSNER and MARVIN D. CHRIST-
ENFELD, Commissioners of Elections for Nassau County,

Respondents.

**MOTION FOR SUMMARY REVERSAL OR, IN
THE ALTERNATIVE, FOR EXPEDITED
CONSIDERATION ON THE MERITS**

Petitioners respectfully move, pursuant to Rule 35 of this Court, for summary reversal of the decision of the United States Court of Appeals for the Second Circuit below, or, in the alternative, for expedited consideration of this matter on the merits. Petitioners have, simultaneously with the filing of the instant motion, filed a petition for a writ of certiorari herein which petitioners request be deemed a brief in support of their motion.

WHEREFORE, petitioners respectfully request that, upon consideration of the petition for a writ of certiorari herein, the decision of the court below be summarily reversed, or, in the alternative, that the petition for certiorari herein be granted and the matter be scheduled for expedited consideration on the merits.


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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No.

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
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JOHN P. LOMENZO, Secretary of State of The State of
New York, WILLIAM D. MEISSNER and MARVIN D. CHRIST-
ENFELD, Commissioners of Elections for Nassau County,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 7, 1972, reversing the judgment and opinion of the United States District Court for the Eastern District of New York entered on February 10, 1972.

Opinions Below

The opinion of the panel of the United States Court of Appeals for the Second Circuit, consisting of Judges Lumbard, Mansfield and Mulligan, is not yet reported and is reproduced in the Appendix hereto at pp. 2a-10a. The opinion of Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York is not yet reported and is reproduced in the Appendix hereto at pp. 11a-37a.

Jurisdiction

The judgment and opinion of the Court of Appeals for the Second Circuit was entered on Friday, April 7, 1972. A motion for a rehearing in banc and for a stay of mandate was made on Monday, April 10, 1972 and was denied on April 24, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Is Section 186 of New York's Election Law unconstitutional insofar as it prohibits persons registering to vote in New York for the first time from participating in New York's June 20, 1972 Presidential Primary unless

they registered and enrolled by October 2, 1971, in time to participate in New York's last preceding general election?

2. Did the Court below apply an improper test to gauge the constitutionality of Section 186?

3. Do "less drastic alternatives" exist, short of disenfranchising the members of petitioners' class, by which the allegedly "compelling state interest" served by Section 186 may be advanced?

Statutory Provisions Involved

New York State Election Law, §186

§186. *Opening of enrollment box and completion of enrollment*

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board,

provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year. L.1949, c.100; amended L.1955, c.41, eff. March 7, 1955.

Statement of the Case

Stephen Eisner, a representative petitioner herein, is a senior at the University of Buffalo who registered to vote for the first time on December 13, 1971 at his parents' home in Nassau County. Petitioner first became eligible to vote on December 30, 1970, when he attained his twenty-first birthday. He failed to register for the November, 1971 general election in Nassau County because, as a student in Buffalo, he was unfamiliar with the essentially local issues posed in the 1971 Nassau County elections.¹ On December 13, 1971, petitioner completed an enrollment blank "sol-

¹ No statewide or national offices were at stake in New York's 1971 general elections. Pursuant to New York law, petitioner was prevented from registering to vote at his college residence. *Election Law*, Section 151.

emly declaring" his affiliation with the Democratic Party and deposited the enrollment blank in a sealed box maintained for that purpose. He was informed, however, that his enrollment in the Democratic Party would be deferred, pursuant to Section 186 of New York's Election Law, until the next scheduled physical opening of the enrollment box on November 14, 1972. He was further advised that since his enrollment in the Democratic Party was deferred pending the physical opening of the enrollment box, he would be ineligible to participate in the Presidential Primary Election scheduled for June 20, 1972. Finally, he was told that, in order to have qualified to vote in the June primary, he should have registered and enrolled on or before October 2, 1971, the last date to register for the November, 1971 general election.

In this action, petitioners challenge the legality of New York's "deferred enrollment" system, codified by Section 186 of the Election Law, which provides that all enrollments in a political party made subsequent to a general election may not become effective, at the earliest, until one week after the next succeeding general election. No distinction is made under Section 186 among a) initial enrollments by "new" voters (such as petitioners herein) registering for the first time; b) cross-over enrollments by established voters seeking to alter a pre-existing enrollment; and c) re-enrollments by established voters newly arrived in New York State who merely wish to continue a pre-existing relationship with a political party.² All are required to un-

² The exceptions to New York's deferred enrollment procedure are set forth in Section 187. The two major exceptions are voters who were too young to register for the last election and persons re-enrolling after establishing a new residence within the same county, both of whom are permitted to enroll immediately in the party of their choice.

dergo a waiting period of up to fourteen months between their attempt to associate with the political party of their choice and the recognition by New York State of their membership in that party.*

Petitioner is representative of the approximately 950,000 newly enfranchised young voters in New York State. It is estimated that no more than 20 per cent of that total registered to vote in the local 1971 New York elections.⁴ Accordingly, approximately 750,000 qualified young voters are precluded from participating in the June Presidential Primary by the operation of Section 186. In addition, the operation of Section 186 renders all persons who established a new residence in New York State after October 2, 1971 ineligible to vote in the June primaries, even though they may have had long established ties with the political party in question.

The Operation of New York's Statutory Scheme

Qualified voters in New York State desiring to associate with one of the four political parties currently recognized under New York law must cope with a cumbersome and archaic process. Each prospective enrollee must complete an enrollment blank containing the following declaration:

* Petitioner Eisner's initial attempt to join the Democratic Party occurred on December 13, 1971, when he completed his enrollment blank. Under New York law, he will not be recognized as an enrolled Democrat until November 14, 1972 at the earliest and February 1, 1973 at the latest—a waiting period of between 11-14 months.

⁴ In order to have qualified to vote in the 1971 November election, petitioner would have to have been registered and enrolled on or before October 2, 1971. The highest elective office at stake in the November 1971 general election was County Executive of Nassau County.

"I,, do solemnly declare that I am a qualified voter of the election district in which I have been registered and that my resident address is; that I am in general sympathy with the principles of the party which I have designated by my mark hereunder; and that it is my intention to support generally at the next general election, state or national, the nominees of such party for state or national offices." *Election Law*, §§174; 369; 385-389.

Once the enrollment blank has been completed, it must be deposited in an enrollment box in such a manner as to conceal the identity of the party and enrollee involved. *Election Law* §173. The enrollment box into which the enrollment blank was deposited must remain locked until the Tuesday following the day of the next preceding general election. *Election Law* §186. No action finalizing an enrollment can occur while the enrollment blank is locked in the enrollment box. Once the enrollment boxes have enjoyed their annual mid-November airing, the respective party affiliations set forth on the enrollment blanks are noted on the official election registers "before the succeeding first day of February." *Election Law* §186. Until the boxes have been opened and the party affiliation formally entered on the register books, the voter involved is not deemed to be enrolled in the party of his or her choice. *Election Law* §186. Once the enrollment boxes are opened, any person doubting the validity of a given enrollment may challenge the sincerity of the voter involved and can disenroll him upon a showing that "the voter is not in sympathy with the principles of such party." *Election Law* §332.

Thus, applying New York's statutory scheme to petitioner Eisner's attempt to attempt to associate with the

Democratic Party, the following events must occur before a prospective voter will be recognized by New York State as affiliated with the political party of his choice:

- 1) He must duly register to vote.
- 2) He must complete an enrollment blank at which he "solemnly declares" his general sympathy with the party with which he wishes to associate. *Election Law* §§174; 369; 385-389.
- 3) He must deposit the completed enrollment blank in a locked enrollment box. *Election Law* §173.
- 4) The completed enrollment blank must remain locked in the enrollment box until November 14, 1972. *Election Law* §186.
- 5) Sometime between November 14, 1972 and February 1, 1973, petitioner's name must be entered on the official register books as an enrolled Democrat. *Election Law* §186.
- 6) Until the register book entry is made, petitioner may not vote in a primary election or participate in any way, in the affairs of the Democratic Party. *Election Law* §186.
- 7) If, after the enrollment boxes are opened a member of the Democratic Party doubts the validity of petitioner's declaration of sympathy, he may move to dis-enroll him. *Election Law* §332.

Thus, despite the fact that petitioner formally expressed his intention to associate with the Democratic Party on December 13, 1971, and "solemnly declared" his general sympathy with the principles of the Democratic Party, he will not be permitted to associate with the Democratic Party until a date somewhere between November 14, 1972 and February 1, 1973, and, therefore, cannot vote in the June Presidential Primary.

The issue posed by this case is whether New York may impose such a drastic curb on the right to vote, the right to associate for the advancement of political beliefs and the right to travel.

Reasons for Granting the Writ and for Summarily Reversing the Decision of the Court Below¹

I.

The Decision Below Is in Direct Conflict With Recent Decisions of This Court Protecting the Right to Vote.

No distinction is made under New York law among a) "new voters," such as the petitioner herein, who are registering for the first time; b) established voters, recently arrived in New York State, who are registering for the first time in New York and who are continuing a pre-existing affiliation with a political party; and c) established voters who are seeking to alter a pre-existing party affiliation. All are subject to the strictures of Section 186. All are prohibited from voting in the June Presidential Primary unless they registered and enrolled in New York on or before October 2, 1971.

In a series of decisions, this Court has enunciated the principle that state action restrictive of the franchise must advance a compelling state interest by the least drastic means in order to pass judicial scrutiny under the Fourteenth Amendment. *E.g., Carrington v. Rash*, 380 U.S. 89

¹ A motion for summary reversal has been made simultaneously with the filing of the petition for a writ of certiorari herein. In view of the motion for summary reversal, counsel has submitted a more extensive certiorari petition than would ordinarily be appropriate. *See, e.g., Socialist Worker's Party v. Rockefeller*, 314 F. Supp. 984 (SDNY), *aff'd* 400 U.S. 806 (1970).

(1965); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Evans v. Cornman*, 398 U.S. 419 (1970); *City of Phoenix v. Kolodziejewski*, 399 U.S. 204 (1970); *Bullock v. Carter*, — U.S. —, 40 USLW 4211 (February 24, 1972); *Dunn v. Blumstein*, — U.S. —, 40 USLW 4269 (March 21, 1972). In the present case, since the "benefit withheld" by New York is the right to vote in a Presidential primary and since the "basis for the classification" involves both recent interstate travel and a requirement of past participation in the electoral process, New York must demonstrate that Section 186 advances a compelling state interest by the least drastic means. *Dunn v. Blumstein*, *supra*, 40 USLW at 4271.

The Court below accepted New York's contention that Section 186 was designed to advance an important state interest by preventing bad faith participation by members of one party in the primary of another. By requiring all enrollments to be made at least nine months prior to a Presidential primary, the Court below ruled that New York was appropriately guarding against such bad-faith raiding.*

* But see, *Beare v. Smith*, 321 F. Supp. 1100 (SD Texas, 1971), in which the District Court, commenting on a Texas law which closed registration on January 31st for a November election, stated:

"There must be other effective safeguards against fraud than . . . to close the registration period at a time when those desiring to register do not even know for sure who the candidates are and what the issues might be." 321 F. Supp. at 1107.

See also, *Socialist Worker's Party v. Rockefeller*, 314 F. Supp. 984 (SDNY), *aff'd* 400 U.S. 806 (1970) where a similar restriction contained in Section 136 of the Election Law was declared unconstitutional in connection with the minority party nominating process in New York.

Even if one assumes that the prevention of bad-faith "raiding" is a compelling state interest,⁷ it does not follow, as the Court below seemed to believe, that Section 186 is constitutional merely because it is "rationally related" to the prevention of raiding. As Mr. Justice Marshall noted in *Dunn v. Blumstein*, *supra*:

"It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP v. Button*, 371 U.S. 419, 438 (1963); *United States v. Robel*, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro v. Thompson*, *supra*, 394 U.S. at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden of constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" 40 USLW at 4273.

An analysis of the scope and impact of Section 186 reveals that far from being a "precise" statute "tailored" to guard against bad faith "raiding," it is a classic example of an overbroad regulatory provision which unnecessarily impinges upon fundamental constitutional rights.

First, if the purpose of Section 186 is to prevent members of one party from crossing over in bad faith to vote

⁷In this regard, it might be noted that one man's "raiding" is another man's "reform". See, generally, *Alexander v. Tedman*, 337 F.2d 962 (3rd Cir.), *cert. den.* 380 U.S. 915 (1964); *Pontikes v. Kasper*, — F. Supp. — (ND Ill. 1972).

in the primary of another, why does New York insist upon applying its strictures to newly enfranchised voters (such as petitioners herein) who are registering and enrolling for the first time? Surely, newly enfranchised voters registering their initial party affiliation do not pose any substantial threat of organized, large scale "raiding." Why would it not be sufficient for New York to advance its alleged interest in deterring "raiding" by applying the strictures of Section 186 only to those persons seeking to alter a pre-existing party affiliation. Cf. *Lippitt v. Cippollone*, — U.S. —, 40 USLW 3334 (Jan. 17, 1972).

Second, if the purpose of Section 186 is to prevent members of one party from crossing over in bad faith to vote in the primary of another, why does New York insist upon applying its strictures to newly established residents of New York, who are registering in New York for the first time and who seek merely to continue a pre-existing affiliation with a political party.* Once again, why would it not

* As Chief Judge Mishler noted, Section 186 acts as a durational residence requirement when applied to recent arrivals in New York:

"It also needs little explanation that the waiting period mandated by the enrollment box system before an enrollment can become effective is a durational residency requirement. This residency requirement may vary in duration from one to eleven months, depending on the time of year the enrollment blank is filled out and put in the box (registration and signing of enrollment blanks are closed during the thirty days before and after the general election). It is a durational residency requirement imposed in *addition* to the ninety days residence required to vote in a general election." (A. 35a-36a)

Viewed as a durational residence requirement for primaries, Section 186 is a clear violation of *Dunn v. Blumstein*, *supra*. See, Point II, *infra*, at pp. 17-19.

It should be noted that Section 186 also disenfranchises not only newly arrived residents of New York, but all New Yorkers who have moved across county lines since the last preceding general election.

be sufficient to restrict Section 186 to persons seeking to alter a pre-existing party enrollment.

Finally, if the purpose of Section 186 is to prevent members of one party from crossing over in bad faith to vote in the primary of another, why does New York insist upon applying its strictures to voters who, concededly, are in good faith in seeking to enroll. Why would it not be sufficient to restrict Section 186 to those enrollees whose *bona fides* have been challenged by the affected political party?

Moreover, New York has already provided a comprehensive system of regulation to guard against bad-faith "raiding" rendering the Draconian measures which have disenfranchised petitioners wholly unnecessary.

First, New York requires all prospective enrollees to "solemnly declare" their allegiance to their chosen political party. *Election Law*, Section 174. Thus, casual party affiliations are impossible in New York and it is an affront to the integrity of the electorate to assume, as did the court below, that large numbers of New Yorkers are likely to falsify the required "solemn declaration" in order to cast a primary ballot in bad faith.

Second, New York has enacted a comprehensive series of criminal sanctions outlawing fraud in the electoral process. It is simply inconceivable that the large scale, fraudulent "raiding" of a political party in violation of Section 174 conjured up by the court below, could exist without a clear pattern of fraud. The threat of criminal sanction would, therefore, drastically deter any attempt at raiding.

Finally, and most importantly, New York has equipped its political parties with an expeditious and efficient dis-enrollment process to enable them to protect themselves

against bad faith "raiders." *Election Law*, Section 332. Pursuant to Section 332, an initial dis-enrollment hearing may be held before a party functionary, thus enabling a political party more than ample self-protection against "raiders." Moreover, contrary to the wholly unsupported assertions of the court below, Section 332 has proven an extremely effective defense against "raiding." As Chief Judge Mishler* noted:

"The state has other, less drastic, means to accomplish its ends if it wishes to protect minority parties and small geographic subdivisions of major parties. Section 332 of the New York Election Law provides that the party enrollment of a voter may be challenged by any fellow party member and cancelled by a Justice of the State Supreme Court upon the determination of the Chairman of the County Committee of the party in the county in which the challenged voter is enrolled that the voter is not in sympathy with the principles of the party.

"That such procedure is highly effective, even on extremely short notice before a primary, is attested to by the results in the three state court cases cited above, *Zuckman*, *Werbelt*, and *Newkirk*. Each of those cases involved challenges to the enrollment of party members. Each case involved an attempted takeover of one party by members of another. Challenges in each of the three cases were successful.

* It should be noted that Chief Judge Mishler is far from unaware of the realities of political life in New York. For many years prior to his elevation to the bench in 1961, he was a leader of the Queens County Republican Party and a candidate for public office on several occasions.

"Such a proceeding, then, is sufficient to protect the permissible interests of the state. The challenge procedure may involve the expenditure of more time and effort on the part of state officials, but New York may not 'deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Carrington v. Rash*, *supra*, 380 U.S. at 96, 85 S. Ct. at 780." (A 26a-27a).

Thus, by failing to restrict the scope of Section 186 to persons altering a pre-existing party affiliation, and by failing to utilize the already existing alternative statutory defenses against bad faith raiding, New York has "unnecessarily" and, therefore, unconstitutionally, deprived petitioners (and the hundreds of thousands of voters similarly situated) of the opportunity to participate in a critical phase of the 1972 Presidential election.

II.

The Decision Below Is in Direct Conflict With Recent Decisions of This Court Invalidating State Action Impinging Upon the Right to Travel.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court recognized that freedom to travel throughout the United States is one of the fundamental personal rights protected by the Constitution. See also, *e.g.*, *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C.J.); *Edwards v. California*, 314 U.S. 160 (1941); *Oregon v. Mitchell*, 400 U.S. 112, 237 (opinion of Brennan, White and Marshall, JJ.), 285-286 (opinion of Stewart, J.).

In *Dunn v. Blumstein*, — U.S. —, 40 USLW 4269 (March 21, 1972), this Court recognized that durational

voting requirements directly impinged upon the right to travel by singling out newly arrived residents and denying them access to the ballot.

Since Section 186 of New York's Election Law disqualifies from the June Presidential primary all persons who have established a residence in New York subsequent to New York's last preceding general election, it operates as an unconstitutional durational residence requirement in direct violation of *Dunn v. Blumstein, supra*. See note 8 *supra*, at p. 14.¹⁰

The Court below did not attempt to deal with the fact that Section 186 imposes a durational residence requirement because it found that the 1970 amendments to the Voting Rights Act of 1965 (42 USC 1973aa(1)), invalidating durational residence requirements in Presidential elections, did not apply to primary elections (A 9a). However, given this Court's decision in *Dunn*, petitioners submit that the issue of the applicability of the Voting Rights Act has become academic. After *Dunn*, Section 186 is unlawful, not because it imposes a durational residence requirement in

¹⁰ In *Jordan v. Meissner*, — U.S. —, 40 USLW 3398 (Feb. 22, 1972) this Court dismissed the appeal of a Georgia resident who had moved to New York and sought to re-establish his long time affiliation with the Democratic Party, but who was barred by Section 186. Unfortunately, in *Jordan*, the Attorney General of New York inadvertently misstated New York law by asserting that Jordan was eligible for special enrollment pursuant to Section 187 of the Election Law. Acting upon the Attorney General's incorrect representation, this Court dismissed Jordan's appeal for want of a substantial Federal question. However, during argument before the court below, the Nassau County Attorney correctly informed the court that Section 187 applies only to persons whose new residence is within the same county as his old residence. *Election Law* §187(c)(6). The Attorney General does not dispute the Nassau County Attorney's reading of the statute, which, indeed, reflects the practice followed throughout New York State.

violation of the Voting Rights Act, but because *all* durational residence requirements for voting unconstitutionally impinge upon fundamental constitutional rights. Thus, whether or not Section 186 is in violation of the Voting Rights Act, it is in clear violation of *Dunn v. Blumstein*, *supra*.

III.

The Decision Below Is in Direct Conflict With Recent Decisions of This Court Protecting the Freedom to Associate for the Advancement of Political Aims.

New York's statutory scheme imposes a "waiting period" of eleven to fourteen months between petitioner Eisner's initial attempt to associate with the Democratic Party and his final acceptance as a party member.¹¹

Since the result of such a statutorily imposed waiting period is the abridgement of petitioner's right to vote in the June Presidential Primary, New York's statutory scheme effects an unlawful abridgement of the franchise and is, therefore, invalid. See generally, Point I, *supra*. However, even if New York's deferred enrollment procedure did not abridge petitioner's right to vote, it would, nevertheless, unquestionably violate his right to freely associate with the political party of his choice. No state may impose onerous restrictions upon an individual's ability to associate with the political party of his choice for the advancement of political goals. E.g., *Williams v. Rhodes*, 393 U.S. 23 (1968); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark., 1968), *aff'd per curiam* 393 U.S. 14 (1968); *United States v. Robel*, 389 U.S. 258 (1967).

¹¹ See footnote 3, *supra*, p. 8.

In *Williams v. Rhodes, supra*, this Court recognized that the right to associate with a political party for the advancement of political goals was protected against state encroachment by the First Amendment. Mr. Justice Black, writing for the Court in *Williams v. Rhodes, supra*, stated:

"In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States." 393 U.S. at 30-31. See also, Mr. Justice Douglas' concurrence, 393 U.S. at 35-38.¹²

In his concurring opinion in *Williams v. Rhodes, supra*, Mr. Justice Harlan described the role which freedom of association plays in the political process. Indeed, Mr. Justice Harlan expressly disclaimed reliance upon the equal protection analysis utilized by this Court in the *Kramer-Evans-Dunn* line of authority. Thus, he recognized that the right to join a political party, free from undue

¹² Mr. Justice Douglas, in language strikingly appropriate to this case observed:

"Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote." 393 U.S. at 40.

state interference, is at the very core of our associational freedoms protected by the First Amendment.

In *Carter v. Dies*, 321 F. Supp. 1358 (N.D. Tex., 1970), *aff'd sub nom. Bullock v. Carter*, — U.S. —, 40 USLW (February 24, 1972), this Court ruled that a Texas requirement of a substantial filing fee in order to participate in a Democratic Party Primary was unconstitutional. The Court recognized that the right to participate in a primary election is protected against state encroachment by the First Amendment's guaranty of freedom of association. In his concurring opinion, in the District Court, Judge Thornberry stated:

"At the very core of this dispute lies the First Amendment's guarantee of the right to engage in association for the advancement of beliefs and ideas. . . ." 321 F. Supp. at 1363.

Thus, to the extent that New York's statutory scheme places obstacles in the path of petitioner's association with the Democratic Party and inhibits him from voting in the June primary, it impinges upon his First Amendment associational rights.

State statutes, such as New York's Election Law, which inhibit free association have been declared unconstitutional under two analyses. Many courts have ruled that such direct restraints on free association are absolutely invalid. E.g., *United States v. Robel*, 389 U.S. 258 (1967); *Boorda v. Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir., 1969), cert. den. 397 U.S. 1042 (1970); *Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (Mr. Justice Douglas concurring). Other courts have ruled that restraints on

associational freedom can survive constitutional scrutiny only if they advance a compelling state interest by the least drastic means. E.g., *NAACP v. Alabama*, 357 U.S. 449 (1958); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark., 1968), *aff'd per curiam* 393 U.S. 14 (1968).

If the "absolute" analysis of *United States v. Robel, supra*, is applied to New York's deferred enrollment scheme, it is, of course, unconstitutional as a direct abridgement on free association.

If the "balancing" analysis of *NAACP v. Alabama, supra*, is applied, it is clear that New York's scheme is unconstitutionally overbroad and far more Draconian than necessary. See *Shelton v. Tucker*, 364 U.S. 479 (1960).¹³

Chief Judge Mishler, in his District Court opinion, expressly recognized the associational values at stake herein and expressly rested his opinion on First as well as Fourteenth Amendment grounds (A 28a). Unfortunately, however, the opinion of the court below reversing Chief Judge Mishler failed to discuss the First Amendment associational aspects of the instant case at all. The failure of the court below to even attempt to grapple with the First Amendment problems raised by the refusal to permit petitioners to associate with the political party of their choice is yet another basis for summarily reversing its opinion.

¹³ As petitioner has demonstrated in Point I, *supra*, Section 186 is certainly not the least drastic means available to guard against fraudulent "raiding".

IV.

New York's Deferred Enrollment Scheme Which Conditions Full Participation in the 1972 Electoral Process Upon Past Participation in the 1971 Electoral Process Is an Unconstitutional "Grandfather Clause" in Violation of the Fourteenth, Fifteenth, and Twenty-sixth Amendments.

In order to participate in the June 1972 Presidential Primary, New York's statutory scheme requires petitioners to have been registered to vote in the November 1971 local elections. In effect, therefore, New York has established a "grandfather clause" which conditions full participation in the 1972 Presidential election upon past participation in 1971 local elections. Since such "grandfather clauses" inevitably fall with disproportionate force upon hitherto unregistered members of racial or ethnic minorities and persons having recently attained voting age, they violate the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.

A. "Grandfather Clauses" and the Right to Vote

Grandfather clauses are, unfortunately, not unknown to the American experience. In two cases, this Court unequivocally ruled that to the extent grandfather clauses act to inhibit full participation in the electoral process, they are unconstitutional. *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939).

In *Guinn*, this Court was faced with an Oklahoma grandfather clause which confined registration without a literacy test to those persons who could demonstrate that a lineal ancestor had participated in an election prior to the Civil War. Although the clause was non-discriminatory on its

face, it obviously fell with disproportionate force upon that segment of the electorate enfranchised by the Fifteenth Amendment. Accordingly, this Court declared it unconstitutional.

In *Lane v. Wilson, supra*, this Court dealt with a second Oklahoma grandfather clause, passed in response to *Guinn*, which confined registration in the absence of a literacy test to those persons whose lineal ancestors either had participated in a pre-Civil War election or had registered during a grace period in 1916. It was conceded that the clause was non-discriminatory on its face and was being applied in an even-handed manner. Nevertheless, this Court, speaking through Mr. Justice Frankfurter, declared the statute unconstitutional because its effect was to frustrate the implementation of the Fifteenth Amendment. In words appropriate to this case, Mr. Justice Frankfurter stated:

"The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively inhibit exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." 307 U.S. at 275.

Just as the Oklahoma grandfather clauses condemned by *Guinn v. United States, supra*, and *Lane v. Wilson, supra*, inevitably fell with disproportionate effect upon the beneficiaries of the Fifteenth Amendment, so New York's grandfather clause unduly abridges the ability of the beneficiaries of the Fifteenth and Twenty-Sixth Amendments to participate in the electoral process.

See generally, *Gangemi v. Rosengard*, 44 N.J. 166, 207 A.2d 665 (1965); *Goetsch v. Philhower*, 60 N.J. Super. 582, 160 A.2d 60 (N.J. Super. 1960); *Cottingham v. Vogt*, 60 N.J. Super. 576, 160 A.2d 57 (N.J. Super. 1960), invalidating similar provisions of New Jersey's election laws.

**B. *The Impact of New York's Statutory Scheme Upon
Hitherto Unregistered Members of Racial Minorities***

It is a stark reality that fewer than 50 percent of the qualified voters in New York, Kings and Bronx Counties participated in the 1970 general elections. Accordingly, New York has been officially designated as subject to the Voting Rights Act of 1965, designed to apply solely to those sectors of the country where non-participation in the electoral process has reached crisis proportions.

It is universally agreed that the overwhelming incidence of non-registration occurs in New York City's black and Puerto Rican ghettos. Indeed, conservative estimates indicate that over one million qualified members of racial minorities have failed to register to vote in New York City alone. Therefore, it is axiomatic that provisions conditioning full participation in the current electoral process upon some degree of past participation in past elections must inexorably bear most heavily upon the mass of black and Puerto Rican electors who have failed to participate in prior elections for reasons ranging from ignorance to despair. Instead of encouraging this mass of unregistered voters to participate in the 1972 Presidential election, New York's statutory scheme perpetuates their exclusion from the democratic process by rendering them ineligible to vote in the June primaries. Thus, to the extent that hitherto unregistered members of racial or ethnic minorities wish to involve themselves in the democratic process—perhaps

because a particular Presidential candidate has captured their affections or loyalty—New York prohibits them from doing so. Such a prohibition, keyed as it is to a failure to have participated in past elections, is in clear violation of the Fifteenth Amendment. *Guinn v. United States, supra*; *Lane v. Wilson, supra*.

C. The Impact of New York's Statutory Scheme on Persons Having Recently Attained Voting Age

The United States Census Bureau estimates that approximately 950,000 persons between the ages of 18-21 were enfranchised by the passage of the Twenty-Sixth Amendment in New York State. However, New York's statutory scheme prohibits beneficiaries of the Twenty-Sixth Amendment who attained the age of eighteen prior to November 2, 1971, from participating in the June primary elections unless they registered to vote in the November 1971 local elections. Thus, approximately 80 percent of the beneficiaries of the Twenty-Sixth Amendment in New York State will be disqualified from participating in the June Presidential Primary solely because they failed to register to vote in local 1971 elections.

The Twenty-Sixth Amendment expressly prohibits the denial or abridgement of the franchise on account of age. Since New York's statutory scheme virtually nullifies the Twenty-Sixth Amendment as applied to the June Presidential Primary, it is clearly an abridgement of the franchise. Moreover, since the abridgement is based upon a young voter's failure to have registered for one local election of limited interest (the only election for which he ever qualified), it is a discriminatory abridgement based upon age.

V.

The Need for Expeditionary Relief Herein.

Unless expeditious relief is forthcoming, thousands of newly enfranchised young voters will be unable to participate in a critical phase of the June Presidential primary currently underway in New York.

New York provides that nominating petitions for candidates for delegate to the Republican and Democratic National Conventions must be circulated from April 4-May 11. Thus, the nominating process for convention delegate (as well as all other offices contested in the June primary) has already begun throughout New York State. However, as a direct consequence of the decision of the court below, literally tens of thousands of young voters who wish to participate in the delegate nomination process, either by signing a delegate nominating petition, or by actually seeking designation as a candidate for convention delegate, are prevented from doing so solely because they were not registered to vote on October 2, 1971.

In addition, registration books for the June 20, 1972 primary close on May 20, 1972. The wide publicity attendant upon the panel's reversal of Chief Judge Mishler will undoubtedly deter large numbers of voters from registering to vote because they now believe themselves ineligible to participate in the forthcoming Presidential primary. Thus, unless the panel's decision is reversed prior to May 20, 1972, thousands of voters will be deprived of an opportunity to register for the June primary, even if the panel's decision is ultimately found to be erroneous.¹⁴

¹⁴ The need for immediate relief is in no way attributable to petitioners' failure to proceed expeditiously. Petitioner Eisner at-

The effect of the Second Circuit's decision upholding Section 186 is to bar the following classes of voters from New York's June Presidential Primary:

- (1) newly enfranchised voters between the ages of 18-21, who failed to register for the first time on or before October 2, 1971;
- (2) all "new" residents of New York who established their residences on or after October 2, 1971; and
- (3) hitherto unregistered members of racial or ethnic minorities who have been drawn into the democratic process for the first time in 1972.

Although the undoubted aim of the Second Circuit was the strengthening of the democratic process, its decision has had precisely the opposite result. Indeed, given the exclusions sanctioned by the court's opinion, New York's June primary is now open to an artificially truncated segment of the electorate from which have been excluded hundreds of thousands of eligible, interested and concededly *bona fide* voters. Such a primary, excluding as it will, large segments of the electorate, can be but a dismal shadow of democracy.

tempted to register and enroll on December 13, 1971—the first day of his Christmas vacation. His action was commenced on December 17, 1971. Judge Mishler rendered his opinion on February 10, 1972 and denied a motion to reargue on February 17, 1972. Petitioners consented to an expedited appeal which was argued before the Second Circuit on February 24, 1972. The Second Circuit's opinion was announced on Friday, April 7, 1972. Petitioners moved for a stay of mandate and rehearing in banc on Monday, April 10, 1972. The Second Circuit denied petitioners' motion on April 24, 1972. The instant petition was filed on April 24, 1972.

CONCLUSION

For the reasons stated above the petition for a writ of certiorari should be granted and the decision of the court below should be summarily reversed, or, in the alternative the matter scheduled for expedited consideration on the merits.

Respectfully submitted,

BURT NEUBORNE

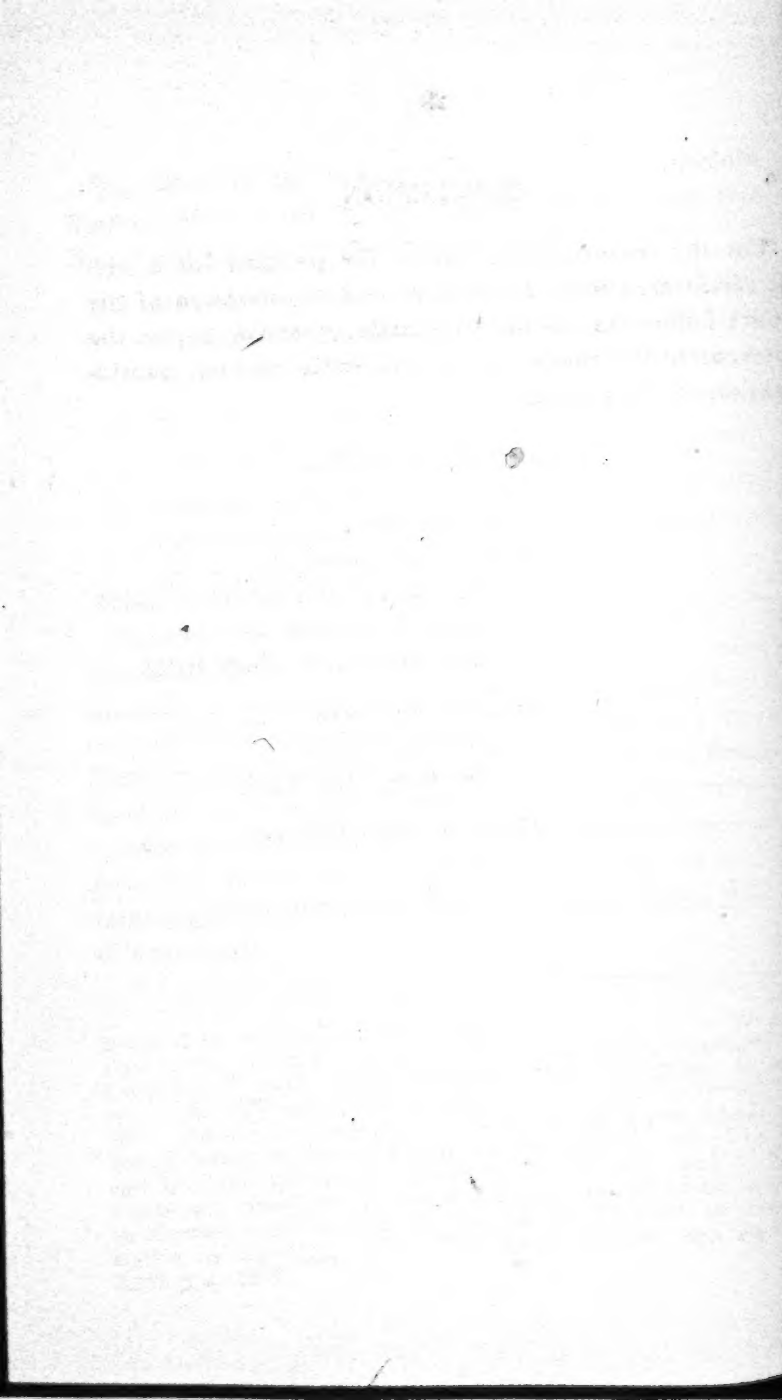
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APPENDIX
Opinion of the United States Court of Appeals
for the Second Circuit
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 632, 633—September Term, 1971.

(Argued February 24, 1972 Decided April 7, 1972.)

Docket Nos. 72-1182-83

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
GOTTESMAN, individually and on behalf of all others
similarly situated,

Plaintiffs-Appellees,

—v—

NELSON ROCKEFELLER, Governor of the State of New York,
JOHN P. LOMENZO, Secretary of State of the State of
New York,

Defendants-Appellants,

MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLER
and J. J. DUBERSTEIN, constituting the Board of Elec-
tions in The City of New York,

Defendants.

STEVEN EISNER, on his own behalf and
on behalf of all others similarly situated,

Plaintiffs-Appellees,

—v—

NELSON ROCKEFELLER, Governor of the State of New York;
JOHN P. LOMENZO, Secretary of State of New York,
WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD,
Commissioners of Elections for Nassau County,

Defendants-Appellants.

Before:

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from a decision in the Eastern District of New York, Mishler, J., declaring New York Election Law §186 unconstitutional on grounds that it violated plaintiffs' First and Fourteenth Amendment rights and that it was in conflict with 42 U.S.C. §1973aa-1(d).

Reversed.

SEYMOUR FRIEDMAN, Brooklyn, New York, for
Plaintiffs-Appellees Pedro J. Rosario, William J. Freedman and Karen Lee Gottesman, et al.

A. SETH GREENWALD, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York and Irving Galt, on the brief), for *Defendants-Appellants Nelson Rockefeller and John P. Lomenzo and Pro Se pursuant to New York Executive Law §71.*

BURT NEUBORNE, New York Civil Liberties Union, Brooklyn, New York (Arthur Eisenberg, on the brief), for *Plaintiffs-Appellees Steven Eisner, et al.*

J. KEMP HANNON (Joseph Jaspan, County Attorney of Nassau County, Mineola, New York, on the brief), for *Defendants-Appellants William D. Meissner and Marvin D. Christensfeld.*

LUMBARD, Circuit Judge:

Defendants below, New York State officials charged with enforcing section 186 of the New York Election Law which provides that voters in primary elections must have been enrolled in the party prior to the previous general election, appeal from Chief Judge Mishler's decision in the Eastern District declaring section 186 unconstitutional as a violation of plaintiffs' rights under the First and Fourteenth Amendments and the federal Voting Rights Act, 42 U.S.C. §1973, as amended 42 U.S.C. §1973aa. We reverse.

Section 186 is part of New York's comprehensive regulation of its electoral processes and, in particular, of its party primary elections. By law only enrolled party members can vote in their party's primary. New York Election Law §201. Section 186 is designed to ensure the integrity of the closed primary and provides that enrollment in a party for the purpose of voting in a primary election must take place prior to the general election previous to the primary.¹ The

¹ Section 186 provides:

§186. Opening of enrollment box and completion of enrollment

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circle or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall

theory behind the statute is that such early enrollment will discourage "raiding," i.e., voters of one party fraudulently designating themselves as voters of another party in order to determine the results of the raided party's primary.

Plaintiffs here, all registered voters, failed to enroll as party members prior to the November 1971 general elections. The effect of section 186 is to exclude them from voting in the 1972 primary elections. Invoking the jurisdiction of the federal courts under 42 U.S.C. §1983, 28 U.S.C. §1343(3), §2281, and §2284, plaintiffs sought the convening of a three-judge court and requested declaratory and injunctive relief against the enforcement of section 186. Subsequently, they dropped their demand for injunctive relief, and, concomitantly, their request for a three-judge court.² The district court granted the requested de-

not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year.

- 2 Defendants have argued that the district court had no power to refuse to convene a three-judge court even though plaintiffs had withdrawn their demand for injunctive relief. We disagree. The Supreme Court has said that section 2281 is not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." *Phillips v. United States*, 312 U.S. 246, 251 (1941). Following this doctrine the Court has carefully differentiated between suits in which declaratory relief is requested and a three-judge court is not appropriate and those in which injunctive relief is requested and a three-judge court is required. *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Since plaintiffs abandoned their claim for injunctive relief at the district court level and prior to the trial, the district judge quite properly determined the issue. See *Merced Ross v. Hervero*, 423 F.2d 591, 593 (1st Cir. 1970).

claratory relief on three grounds: that section 186 violated plaintiffs' Fourteenth Amendment rights to equal protection because raiding can be equally well or better prevented by New York Election Law §332 which provides for direct challenges to allegedly fraudulent enrollments, yet under which plaintiffs would not be kept from voting; that section 186 infringed the plaintiffs' First Amendment rights of association with other party members, yet advanced no compelling state interest, or failed to do so by the least drastic means; and that section 186 was in direct conflict with the federal Voting Rights Act §1973aa-1(d) which provides "each State shall provide by law for the registration . . . of all duly qualified residents . . . not later than thirty days immediately prior to any presidential election." We disagree.

The political parties in the United States, though broad-based enough so that their members' philosophies often range across the political spectrum, stand as deliberate associations of individuals drawn together to advance certain common aims by nominating and electing candidates who will pursue those aims once in office. The entire political process depends largely upon the satisfactory operation of these institutions and it is the rare candidate who can succeed in a general election without the support of the party. Yet the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—would be seriously impaired were members of one party entitled to interfere and participate in the opposite party's affairs. In such circumstances, the raided party would be hard-pressed to put forth the candidates its members deemed most satisfactory. In the end, the chief loser would be the public.³

3 New York has a particular interest in preventing raiding. In addition to the major parties, Democrat and Republican, two minority parties,

Section 186 is part of New York's scheme to minimize the possibility of such debilitating political maneuvers. Designed to prevent primary crossover votes cast only to disrupt orderly party functioning, the statute requires that enrollment in the party be completed by a date sufficiently prior to the primary to decrease the likelihood of raiding. The Supreme Court has made clear that "prevention of [electoral] fraud is a legitimate and compelling government goal." *Dunn v. Blumstein*, 40 U.S.L.W. 4269, 4274 (March 21, 1972). "[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Bullock v. Carter*, 40 U.S.L.W. 4211, 4215 (Feb. 24, 1972). And a candidacy determined by the votes of non-party members for purposes antagonistic to the functioning of the primary system is, in practical effect, a fraudulent candidacy. Given the importance of orderly party primaries to the political process, we hold that the prevention of "raiding" is a compelling state interest.⁴

Conservative and Liberal, are established throughout the state and usually present a full slate of candidates in the general election. Yet as there are only 107,000 enrolled Conservatives and 109,000 enrolled Liberals as opposed to 2,950,000 enrolled Republicans and 3,565,000 enrolled Democrats, successful raiding of these minority parties would present little difficulty on a state-wide basis absent §186.

- 4 Restrictions on the exercise of the franchise, dealing as they do with the fundamental rights of voting and association have been closely scrutinized by the courts; e.g., *Dunn v. Blumstein*, 40 U.S.L.W. 4269 (March 21, 1972); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *William v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); and primaries as well as general elections have been subjected to this exacting scrutiny, e.g., *Bullock v. Carter*, 40 U.S.L.W. 4211 (Feb. 24, 1972); *Smith v. Allwright*, 321 U.S. 469 (1944); *United States v. Classic*, 313 U.S. 299 (1941).

Applying this standard to our review of section 186, we find that the statute advances a compelling state interest and that it does so in a manner calculated to impinge minimally on First and Fourteenth Amendment rights.

Moreover, section 186 is carefully designed to infringe minimally on First and Fourteenth Amendment rights. The statute works indirectly to its end of having only voters in general sympathy with the party vote in that party's primary. By requiring enrollment some seven to nine months prior to the primary and also prior to the general election, it takes full advantage of the facts that long-range planning in politics is quite difficult and that neither politician nor voter wishes to give the impression that he is deliberately engaging in fraud. Thus the notion of raiding, its potential disruptive impact, and its advantages to one side are not likely to be as apparent to the majority of enrolled voters nor to receive as close attention from the professional politician just prior to a November general election when concerns are elsewhere as would be true during the "primary session," which, for the country as a whole, runs from early February until the end of June. Few persons have the effrontery or the foresight to enroll as say, "Republicans" so that they can vote in a primary some seven months hence, when they full well intend to vote "Democratic" in only a few weeks. And, it would be the rare politician who could successfully urge his constituents to vote for him or his party in the upcoming general election, while at the same time urging a cross-over enrollment for the purposes of upsetting the opposite party's primary. Yet the operation of section 186 requires such deliberate inconsistencies if large-scale raiding were to be effective in New York. Because of the statute, it is all but impossible for any group to engage in raiding. Allowing enrollment any time after the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another.

Plaintiffs have argued, however, that even if the effectiveness of section 186 as a deterrent on raiding be established, still the statute must be struck down for it also keeps from voting in a primary the registrant who has only inadvertently failed to enroll prior to the general election and who has no intention of "raiding" one of the parties. Plaintiffs argue that section 332 of the Election Law which allows for a direct challenge to enrollees would be sufficient to accomplish the antiraiding purpose of section 186 and would, at the same time, allow the nonraiding late enrollee to vote in the primary. While it is true that section 186 and section 332 are aimed at the same evil of raiding, it is obvious that the use of 332 to prevent raiding would be far too cumbersome to have any deterrent effect on raiding in a primary. *Cf. Bullock v. Carter*, 40 U.S.L.W. 4211, 4214 (Feb. 24, 1972).

Section 332 is a narrowly drawn statute appropriate for striking from the enrollment rolls only one name at a time. Each such challenge requires a full judicial inquiry, with its high cost in money, time and manpower for the challenging party. Its efficacy, even in the single case is not clear for proof of a man's allegiance to one party or another is often difficult to secure. Unlike proof of residence, for which objective evidence, *e.g.*, ownership of a dwelling, car registration, or a driver's license, is easily at hand, proof of allegiance to one party or another demands inquiry into the voter's mind. The very great majority of voters have no closer contact with their political party than pulling the lever or marking the ballot in the voting booth. In the absence of the availability of evidence regarding a voter's party preference and faced with large-scale raiding, party officials relying only on section 332 would be virtually impotent. By contrast, section 186 has a broad deterrent effect. The burden of change is placed upon the raider not the party and the

statute requires the cross-over at a particularly difficult time. In requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means. We think section 186 is a proper means to safeguard a valuable state interest.⁵

We are supported in our conclusion by the Supreme Court's recent decision in *Lippitt v. Cipollone*, 40 U.S.L.W. 3334 (Jan. 17, 1972). There the Court affirmed without opinion a decision of the Northern District of Ohio declaring constitutional Ohio Rev. Code §3513.191 which provides "[n]o person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." Holding the statute constitutional the lower court found that it preserved "the integrity of all political parties and membership therein" by "prevent[ing] 'raiding' of one party by members of another party and [by] preclud[ing] candidates from '... altering their political party affiliations for opportunistic reasons.'" *Lippitt v. Cipollone*, 71-667 (N.D. Ohio, Nov. 5, 1971). The Supreme Court's affirmance indicates beyond dispute that the prevention of raiding is a compelling state interest and that a reasonable extended period of time before an enrollment can be changed is a proper means to halt this practice.⁶

⁵ New York does allow post-general election enrollment in certain cases. Section 187 of the Election Law allows late enrollment if, for example, the enrollee came of age after the past general election or if he was ill during the enrollment period. The import of section 187 is that New York is not opposed to later enrollment per se.

⁶ Defendants have argued that the Supreme Court's dismissal for want of a substantial federal question of a case ostensibly raising the same issues as the instant case, *Jordan v. Meisser*, 40 U.S.L.W. 3398 (Feb. 22, 1972), is controlling in this litigation. However, in *Jordan v. Meisser*, the New York Attorney General argued to the Court that the plaintiff

Plaintiffs' final argument is that section 186 is in direct conflict with 42 U.S.C. §1973aa-1(d) which provides: "each State shall provide by law for the registration . . . of all duly qualified residents . . . not later than thirty days immediately prior to any presidential election . . ." Plaintiffs argue that "presidential election" includes presidential primary. We disagree.

Section 1973aa-1(d) was passed as part of the Voting Rights Act of 1970. The statute itself makes no reference to primary elections speaking only of "voting for the offices of President and Vice President," §1973aa-1(a), or "vot[ing] for the choice of electors for the President and Vice-President," §1973aa-1(d) and the more usual meaning of "presidential election" is the quadrennial November election rather than the party primaries. On its face, then, the statute is not applicable to primary elections. The legislative history is silent on whether section 1973aa-1(d) was intended to apply to primaries. 1970 U.S. Cong. Code and Admin. News 3277, 3285. However, at the same time Congress enacted section 1973aa-1(d), it also passed into law section 1973bb reducing the voting age to eighteen in federal, state and local elections. See *Oregon v. Mitchell*, 400 U.S. 112 (1970). In so doing, Congress specifically addressed itself to "voting in any primary or in any election." 42 U.S.C. §1973bb. The deliberate inclusion of the word "primary" here coupled with its absence in section 1973aa is further indication that Congress was not dealing with primaries in section 1973aa. We conclude that section 1973aa has no application to this case.

Reversed.

Jordan had failed to utilize the provisions of section 187 of the New York Election Law under which he could have enrolled in a party after the general election in order to participate in the primary election. Section 187, however, allows post-general election enrollment only in narrowly-defined circumstances and none of the plaintiffs here has this alternate route of enrollment presently available to him.

**Opinion of the United States District Court,
Eastern District of New York**

February 10, 1972

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

No. 71-C-1573

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
GOTTESMAN, individually and on behalf of all others sim-
ilarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of The State of New York,
JOHN P. LOMENZO, Secretary of State of The State of
New York, MAURICE J. O'ROURKE, JAMES M. POWER,
THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the
BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendants.

No. 71-C-1621

STEVEN EISNER, on his behalf and on behalf of all
others similarly situated,

Plaintiffs,

—against—

NELSON ROCKEFELLER, Governor of The State of New York,
JOHN P. LOMENZO, SECRETARY of State of The State of
New York, WILLIAM D. MEISSNER and MARVIN D. CHRIS-
TENFELD, Commissioner of Elections for Nassau County,

Defendants.

Plaintiffs in these class actions represent voters who were qualified to register to vote and to enroll in a political party on or before November 2, 1971, the date of the last general election. They failed to do so.

In December, 1971 each named plaintiff appeared at an office of the Board of Elections in the county in which he or she resided. Each registered, demanded and received an enrollment blank. Each completed the enrollment blank in which he or she declared that he or she was in general sympathy with the principles of the political party of choice, and intended to support the nominees of that party in the general election. The completed enrollment blanks were then deposited in a locked enrollment box and kept sealed as mandated under Section 186 of the Election Law of the State of New York. They will remain sealed until the Tuesday following the next general election on November 7, 1972.¹

The actions, brought pursuant to 42 U.S.C. §1983, claim that Section 186 of the Election Law of the State of New York² is a violation of the First, Fourteenth and Twenty-

¹ The Court consolidated the actions as provided in Rule 42A.

² Plaintiff Eisner has withdrawn his complaint and prayer for relief with respect to §117, dealing with absentee ballots, inasmuch as litigation is pending on that issue elsewhere.
§ 186. *Opening of enrollment box and completion of enrollment*

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a

Sixth Amendments to the Constitution and the Voting Rights Act of 1965 (42 U.S.C. §1973) and the 1970 Amendments thereto (U.S.C. §1973 aa).

Plaintiffs seek a declaratory judgment declaring Section 186 of the Election Law of the State of New York unconstitutional.*

The June primary in the State of New York will be a contest for party nominations for State Senator, State Assemblyman, United States Congressmen, United States Senators and delegates to the national nominating conventions of the major political parties. The delegates to the national nominating conventions will in turn choose candidates of the major political parties for President and Vice-President.

New York has a closed primary system in which only duly enrolled members of a party may vote in that party's primary election. The enrollment box system provided in

central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year. L.1949, c.199; amended L.1955, c.41, eff. March 7, 1955.

* Plaintiffs originally moved for the convening of a three Judge Court, and thereafter withdrew the motion for a three Judge Court.

the statutory scheme of the New York Election Law effectively deprives plaintiffs and the members of their class who are otherwise qualified by reasons of age, citizenship and residence in the State of New York of the privilege of voting in the June, 1972 primary, running for party office,⁴ or signing designating petitions for candidates wishing to enter the primary.

I. EQUAL PROTECTION

The right to vote, whether denominated the right of suffrage or simply "the franchise," has long been held by the Supreme Court to be one of the basic rights of citizenship. As the Court recognized in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964): "Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S., at 370, 6 S.Ct., at 1071." (377 U.S. at 561-62, 84 S.Ct. at 1381).

The scrutiny to which any infringement of the right to vote is subject under the Equal Protection Clause of the Fourteenth Amendment has become increasingly severe in the past decade. In *Reynolds v. Sims*, *supra*, the Court was faced with a challenge to the apportionment of the two houses of the Alabama Legislature. The challenge was founded on the alleged over-representation of rural districts, and a resulting violation of equal protection guarantees. The Court there said:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and

⁴ Party officials are also elected in the primary election.

unimpaired manner is preservative of other basic civil and political rights, *any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.* (377 U.S. at 561-62, 84 S.Ct. at 1381) [Emphasis supplied.]

In *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965), the Court dealt with a challenge to a Texas constitutional provision prohibiting any member of the armed forces of the United States who moved to Texas during the course of his military duty from ever voting in any election in that state as long as he remained a member of the armed forces. After invalidating that provision on equal protection grounds the Court continued:

We deal here with matters close to the core of our constitutional system. 'The right . . . to choose,' *United States v. Classic*, 313 U.S. 299, 314, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, that this Court has been so zealous to protect, means, *at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.* (380 U.S. at 96, 855 at 780) [Emphasis supplied.]

In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966), the Court, after characterizing the right to vote as a fundamental right, went on to advise that

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, *classifications which might invade or restrain them must be closely scrutinized and care-*

fully confined. [Citations omitted.] These principles apply here. (383 U.S. at 670, 86 S.Ct. at 1083) [Emphasis supplied.]

As can easily be seen, the increasing rigor to which state statutory and constitutional provisions were subjected in *Reynolds*, *Carrington* and *Harper*, was at variance with the traditional equal protection test. That test, as enunciated in the classic definition given by the Court in *McGowan v. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101 (1961), is much less stringent. The Court in *McGowan* defined the traditional test as follows:

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* (366 U.S. at 425-26, 81 S.Ct. at 1105) [Emphasis supplied.]

At the October Term of 1968, the Supreme Court continued to enlarge the divergence between the treatment to be accorded most state statutes when attacked as violating the Equal Protection Clause and the treatment to be accorded those statutes specifically affecting the right to vote. In *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968), the Court was presented with a challenge to a set of Ohio

statutes which made it extremely difficult for any party other than the Democratic or Republican Party to achieve the status of an established party and to have its name and its candidates placed on the ballot in the general election. The statutory scheme was attacked not only as a denial of the equal protection of the laws, but also as in violation of the First Amendment freedom of association. In holding the statutes involved unconstitutional, the Court rested its decision both on the infraction of the Equal Protection Clause and on the infringement of First Amendment rights. The test applied by the Court, however, was not whether any merely rational basis could be imagined to justify the enactment of the statutes, but whether or not there was any *compelling* state interest to justify their existence.

The Court drew support for the use of this test from a case which had not involved the right to vote, but was solely concerned with First Amendment rights of association. The Court in *Williams* stated:

In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling State interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' *NAACP v. Button*, 371 U.S. 415, at 438, 83 S.Ct. 328, at 341 (1963). (393 U.S. at 31, 89 S.Ct. at 11).

The Court concluded by saying that "The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate," and "... the totality of the Ohio restrictive

laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." (393 U.S. at 31 and 34, 89 S.Ct. at 11 and 12).

The opinion in *Williams v. Rhodes*, *supra*, left one in some doubt as to whether the compelling state interest test would be applied to cases involving only voting rights and having no First Amendment overtones. Later in that same Term, however, the Court decided *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886 (1969), and did much in the *Kramer* opinion to clarify its view of the appropriate test to be used when statutes involving the right to vote are challenged on equal protection grounds.

In *Kramer*, the challenged statute restricted the vote in local school board elections to those otherwise qualified voters who were either parents of children attending schools within the local public school system or were owners or lessees of real property within the school district.⁵ The plaintiff, a registered voter, resided with his parents and was thus prevented from voting in the local school elections. No First Amendment issues were involved in the case. The Court held that the compelling state interest test applied to the voting restrictions in issue, and, finding no such interest, voided the statute.

In arriving at its decision, the Court in *Kramer* made a distinction between two types of restrictions on the franchise and held that the compelling state interest test would only be applied in cases involving statutes constituting the latter type of restriction. The Court said:

At the outset, it is important to note what is *not* at issue in this case. The requirements of §2012 that

⁵ New York Education Law §2012 (McKinney 1969).

school district voters must (1) be citizens of the United States, (2) be *bona fide* residents of the school district, and (3) be at least 21 years of age, are not challenged.

Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. *Carrington v. Rash*, 380 U.S. 89, 91, 85 S.Ct. 775, 777, 13 L.Ed.2d 675 (1965); *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904).

The sole issue in this case is whether the *additional* requirements of §2012—requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections—violate the Fourteenth Amendment's command that no state shall deny persons equal protection of the laws. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. [Footnote omitted.] Therefore, if a challenged state statute grants the right to vote to some *bona fide* residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. (395 U.S. at 625-27, 89 S.Ct. 1888-90). [Emphasis in original.]

It is evident from the Court's opinion in *Kramer* that once a state has imposed basic voting requirements of citizenship, age, and residency, all further requirements (which by their nature must be viewed as restrictions)

must of necessity be supported by a compelling state interest. This in effect places the burden of proof on the state, the reverse of the situation where the rational basis test is applied. The basic requirements of citizenship, age and residency, are to be tested, when they are challenged, by the traditional, "rational relation" test, used in garden-variety equal protection cases.

Kramer provides us with a relatively simple guide to the test to be used in examining any state statute dealing with voting rights when that statute is challenged as in violation of the Equal Protection Clause. The explicit theory propounded in *Kramer* serves to rationalize the results in the prior voting rights cases. The requirement of rural residency in order to have a fully weighted vote in *Reynolds*, the requirement of being either a civilian or a resident of Texas prior to entering military service in order to vote in *Carrington*, and the requirement of a voting fee or poll tax in *Harper*, are all "additional" requirements within the meaning of that term as used in *Kramer*. See also *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 90 S.Ct. 1990 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897 (1969).

One of the questions presented by the instant case is whether or not the compelling state interest test is applicable in an examination of the statute herein attacked. In order to decide this question this court must first decide whether the right to vote protected in *Kramer*, *Williams*, *Carrington*, *Harper*, and *Reynolds*, includes the right to vote in a primary election. The defendants here claim that it is not so included, arguing that a primary is an internal party matter, and further, that a party is a purely private organization.

This view of primary elections, and, indeed, of the entire process of selecting candidates to be voted for at general elections, is belied by case law. It is true that primary elections and party affairs in general were once so regarded. In *Newberry v. United States*, 256 U.S. 232, 41 S.Ct. 469 (1921), the Supreme Court was faced with a challenge to the constitutionality of what was then the Federal Corrupt Practices Act. (Section 8 of the Act as then in force.) (Section 8, Act of June 25, 1910, c. 392, 36 Stat. 822-24, as amended by Act of August 19, 1911, c. 33, Section 2, 37 Stat. 25-29.)

The plaintiffs-in-error in *Newberry*, had been found guilty in the lower court of violating Section 8, in that, among other things, they had used or expended more than the allowed amount in causing the named plaintiff-in-error to receive the Republican nomination for Senator in the State of Michigan at the primary election held on August 27, 1918. The Court found that Congress exceeded the power granted in Article I, Section 4, of the Constitution, to determine "the times, places and manner of holding elections for Senators and Representatives. . . ." since the word "elections" did not include primaries. The Court held:

The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election, and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871. Primaries were then unknown. Moreover, they are in no sense elections for an office, but merely methods by

which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in Constitutions or statutes are not necessarily applicable to primaries—the two things are radically different. (256 U.S. at 250, 415 at 472 (1921).)*

Twenty years later the Court reversed itself. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031 (1941), Louisiana election officials had been indicted under what are now Sections 241 and 242 of Title 18 U.S.C. They were accused of falsifying ballots at a primary election involving the choice of federal candidates. A challenge to the indictment was made and sustained in the lower court on the ground that Congress had no power to regulate primary elections. The Supreme Court reversed, distinguishing *Newberry* on the grounds previously adverted to, and concluding that:

Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, Section 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, *whether the voter exercises his right in a*

* Mr. Justice McKenna concurred in the opinion, as written, only on the ground that the statute under consideration had been enacted prior to the Seventeenth Amendment. He specifically reserved the question of the power of Congress under that Amendment. The other four Justices would have upheld the power of Congress to regulate primary elections.

party primary which invariably, sometimes or never determines the ultimate choice of the representative." (313 U.S. at 318, 61 S.Ct. at 1039). [Emphasis supplied.]

Finally, in *Smith v. Allwright*, 321 U.S. 469, 64 S.Ct. 757 (1944), the Supreme Court found itself able to say that "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." (321 U.S. at 661-62, 64 S.Ct. at 764).

The right to vote in primary elections is indeed part of the "right to vote," incursions into which are to be judged according to the classifications and standards set up in *Kramer*. It is clear that the right to vote protected by Article I, Section 2 of the Federal Constitution includes voting in all elections, both primary and general, dealing with the choice of federal legislators.

However, the provisions of the Equal Protection Clause of the Fourteenth Amendment apply not only to a state's discrimination in the allocation of federal rights, but also to a state's discrimination in the allocation of any other rights which the state may see fit to create. In this regard, it is to be noted that the State of New York has included the right to vote in primary elections in the rights protected by Article I, Section 1 of the New York State Constitution. As construed by the Court of Appeals in the case of *In Re Terry*, 203 N.Y. 293, 96 N.E. 931 (1911), Article I, Section 1 of the State Constitution secures to the people the right to participate in the nominating process:

The franchise of which no "member of this state" may be deprived is not only the right of citizens who possess the constitutional qualifications to vote for public officers at general and special elections, but it also includes the right to participate in the several methods established by law for the selection of candidates to be voted for. (203 N.Y. at 295, 96 N.E. at 932).

Defendants protest any reliance upon *Classic, supra*, or *Allwright, supra*, as support for the proposition that primary elections are to be considered in the same light as general elections when construing the bounds of the right to vote. They argue that the fact that all of these cases arose in what were effectively single party states vitiate their applicability to primary elections in states which do not have single party systems. In response to this it must be said that the Supreme Court was well aware of the actual nature of primary elections in Texas and Louisiana, and it specifically rejected any notion that its decisions were to be applied solely in those situations where a primary was actually a general election. As stated previously, the Court in *Classic, supra*, would have its holding apply either "[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice. . . ." [Emphasis supplied.] The Court further stated that the right to vote in a primary is protected "whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." (313 U.S. at 318, 61 S.Ct. at 1039).

That primary elections are "an integral part of the procedure of choice" in the State of New York is evident

from the extensive statutory provisions regulating such elections. Primaries in New York are conducted by Public officials and financed from public funds. Their conduct, including all means by which candidates are placed on the primary ballot, is regulated by the State. Although the primary elections in New York State as a whole cannot be said to "effectively control the choice . . .", the fact is that they do effectively control the choice in many areas of New York State which are for all intents and purposes one party areas. However, it is unnecessary for this Court to rely on the second leg of the *Classic* statement quoted in the paragraph above, as it is evident that primaries are an integral part of the procedure of choice in New York and that this suffices.

Applying the standards of *Kramer*, then, it is clear that the voting requirement embodied in §186 of the New York Election Law is a requirement neither of age, nor of citizenship, nor of residence and is thus an additional requirement which is subject to examination under the compelling state interest test. Section 186 in effect requires voters who have met the basic state requirements of age, citizenship, and residence, to have enrolled in a political party prior to the last general election preceding the primary in which they desire to vote, in order to vote in that primary.

The state interest propounded by the defendants in support of the enrollment box system is New York's interest in insuring the integrity of its political parties and in preventing inter-party raiding. Defendants argue that, absent the enrollment box provisions of §186, voters not in basic sympathy with the principles of a specific party would find it easy to organize and enroll in that party in large numbers before a primary so as to be able to

vote in that party's primary and subvert its basic interests.

It is true that such raiding is possible. See *Matter of Zuckman v. Donohue*, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct.), aff'd 274 A.D. 216, 80 N.Y.S.2d 698 (3rd Dept.) aff'd without opinion 298 N.Y. 627, 81 N.E.2d 371, 86 N.Y.S. 2d — (1948); *Matter of Werbel v. Gernstein*, 191 Misc. 274, 78 N.Y.S.2d 440 (Sup. Ct. 1948); *Matter of Newkirk*, 144 Misc. 765, 259 N.Y.S. 434 (Sup. Ct. 1931).⁷

However, where a law is subject to the compelling state interest test it "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290 (1964). Assuming, *arguendo*, that the protection of party integrity is a "permissible state policy," no showing has been made that the enrollment box system is necessary to its accomplishment.

The state has other, less drastic, means to accomplish its ends if it wishes to protect minority parties and small geographic subdivisions of major parties. Section 332 of the New York Election Law provides that the party enrollment of a voter may be challenged by any fellow party member and cancelled by a Justice of the State Supreme Court upon the determination of the Chairman of the County Committee of the party in the county in which

⁷ Each of these cases involved the attempted takeover of a party organization by adherents of another party. In each case, they were almost successful. Nevertheless, it is to be noted that the enrollment box system was in effect throughout the period during which these cases arose, and that that system in no way prevented hundreds of determined voters from organizing prior to the last general election and changing their party enrollments so as to be able to "raid" the other party. All of these cases arose when the enrollments of the raiders were challenged by bona fide party members.

the challenged voter is enrolled that the voter is not in sympathy with the principles of the party.

That such procedure is highly effective, even on extremely short notice before a primary, is attested to by the results in the three state court cases cited above, *Zuckman*, *Werbelt*, and *Newkirk*. Each of those cases involved challenges to the enrollment of party members. Each case involved an attempted takeover of one party by members of another. Challenges in each of the three cases were successful.

Such a proceeding, then, is sufficient to protect the permissible interests of the state. The challenge procedure may involve the expenditure of more time and effort on the part of state officials, but New York may not "deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington v. Rash*, *supra*, 380 U.S. at 96, 85 S.Ct. at 780.

The explicit and comprehensive criminal sanctions for various violations of the elective franchise provided for in Article 16 of the Election Law, §420 et seq., further buttress the state's ability to protect the integrity of its political parties and election procedures.

Defendants also argue that plaintiffs have waived their constitutional right to vote in the primaries, or are estopped from asserting it, by reason of their failure to enroll prior to the last general election. In dealing with fundamental constitutional rights like the right to vote, the Supreme Court has said: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (Footnote omitted). *Brady v. United States*, 397 U.S. 742, at 748, 90 S.Ct. 1463, at 1469 (1970). See also *Brookhart v. Janis*,

384 U.S. 1, 4, 86 S.Ct. 1245 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).^{*}

Bearing in mind the principles of these cases and the importance of the rights in question, this Court cannot say that there has been any waiver in this case. Plaintiffs remain free to assert their rights in court, and are not barred from doing so by any asserted waiver or estoppel.

II. FIRST AMENDMENT

The right to vote is inextricably tied to the right of free expression and the related right of free association. The right to vote is meaningless unless accompanied by the opportunity to exchange ideas and opinions.

Plaintiffs further contend that the "waiting period" imposed by New York's statutory scheme between their initial attempts to enroll in a political party and their final acceptance as party members violates their right to freely associate with the party of their choice for the advancement of their political aims and ideals. As such, they maintain, the enrollment box system violates the First Amendment.

The Court agrees. The system is an unconstitutional infringement by the state of rights guaranteed by the First and Fourteenth Amendments to the Constitution. Absent a compelling state interest, no state may impose onerous burdens on the right of individuals to associate

^{*} Although these principles were announced in criminal cases, it can hardly be said that the rights of voting, free expression, and free association are any less fundamental and sacred than the rights reserved to those accused of crimes. These rights ought not lightly to be considered forfeited. It is perhaps most important that a right not need burdensome administrative renewal when the critical nature of a current situation sparks a citizen to speak out. See, e.g. *Beare v. Smith*, 321 F. Supp. 1100 (1970) (Three Judge Court).

for the advancement of political beliefs and the right of qualified voters to cast their votes effectively. *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968).

The effect of New York's enrollment laws is to postpone plaintiffs' right to associate with members of the political party of their choice and to participate in the affairs of that party. They are denied the right to vote in primary elections, to sign designating petitions, to become regular designees of the party for public office, or to become candidates for party office, until the enrollment box is unlocked and they are enrolled. The citizen who moves into another county after a general election, or who switches party loyalty or who only later decides to take an interest in party affairs is denied the right to associate with others of the same political views for an unreasonable length of time.

Several formulations of the test that alleged infringements of First Amendment rights must satisfy to uphold their constitutionality have been advocated of used by the courts. These include "balancing" of interests, the absolute standard, "less drastic means," and the "compelling interest" test.

"Balancing" would involve weighing the governmental interest in the purpose of the statute in question against the First Amendment rights alleged to be infringed. In *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419 (1967), however, the Supreme Court expressly declined to use such a test. In striking down an overbroad federal statute, the Court stated:

We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are

at stake. The task of writing legislation which will stay within those bounds has been committed to Congress. Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms." *Shelton v. Tucker*, *supra*." 88 S.Ct. at 425-26, 389 U.S. 267-69, and see also fn. 20.

Nor is it certain that *Robel*, *supra*, *Boorda v. Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969), *cert. den.* 397 U.S. 1042 (1970), and *Williams v. Rhodes*, *supra* (concurring opinion of Mr. Justice Douglas) have held that direct restraints on free association are absolutely invalid. It appears that *Robel* was applying the "less drastic means" test of *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247 (1960). In overturning a state statute requiring teachers to disclose their every associational tie, the *Shelton* court stated:

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' The breadth of legislative abridgment must be viewed in the light of *less drastic means* for achieving the same basic purpose. 364 U.S. 479, 488, 81 S.Ct. 247, 252. (emphasis supplied, footnote omitted).

Another line of cases has settled upon the "compelling state interest" test whenever it is alleged that state action

infringes First Amendment rights protected through the Due Process Clause of the Fourteenth Amendment. In *NAACP v. Alabama*, a state statute requiring the NAACP to produce its records including the names of its members was held unconstitutional. In determining whether Alabama had demonstrated an interest in obtaining the information sufficient to justify the deterrent effect which the disclosures might have on associational rights, the Court said, "Such a ' . . . subordinating interest of the State must be compelling,' *Sweezy v. New Hampshire*, 354 U.S. 234, 265, 77 S.Ct. 1203, 1219, 1 L.Ed.2d 1311 (concurring opinion)." 357 U.S. 449, 463, 78 S.Ct. 1163, 1172 (1958).

This development was continued in *Bates v. City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412 (1960), and *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328 (1963), and culminated in *Williams v. Rhodes*, *supra*. In the latter case, Ohio election laws were challenged that made it very difficult for a new political party to be placed on the state ballot to choose electors pledged to particular candidates for President and Vice President. In language that aptly describes the present case also, Justice Douglas stated:

Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. 393 U.S. 23, 39, 89 S.Ct. 5, 15 (concurring opinion).

Speaking for the Court, Mr. Justice Black said:

In the present situation the state laws place burdens on two different, although overlapping, kinds of right

—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank high among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment.^{*} And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.⁷ 393 U.S. 23, 30-31, 89 S.Ct. 5, 10 (footnotes omitted).

In determining whether Ohio had the power to place substantially unequal burdens on both the right to vote and the right to associate, the Court reaffirmed that “only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms.” (citing *NAACP v. Alabama, supra*).⁸

Thus, First Amendment freedoms are within the state’s power to limit and regulate only when the state has a compelling state interest that is served by that regulation. Furthermore, there must be a “substantially relevant connection” between the state’s compelling interest and the means that are chosen to effect the regulation. *Shelton v.*

^{*} Although Justice Harlan specifically limited his concurrence to the proposition that Ohio’s statutory scheme violated the basic right of political association assured by the First Amendment which is protected against state infringement under the Due Process Clause of the Fourteenth Amendment, it now appears that the Supreme Court has fixed upon the compelling state interest test to test alleged infringements of the right to vote and of First Amendment rights on either Due Process or Equal Protection grounds.

Tucker, supra, 364 U.S. 449, 485, 81 S.Ct. 247, 250. This is essentially saying that the State must utilize the least drastic means available to effect its legitimate interest. If the state fails to prove either that its interest is compelling or that the means chosen are the least drastic means possible, the regulation must fall as an overbroad infringement of the First Amendment right.

As outlined above, the Court finds that the state has failed to prove that it has a compelling interest in the values that the enrollment box system was designed to protect, and that even if it had such a compelling state interest, it has not utilized the least drastic means. The challenge procedures and the criminal sanctions outlined in the Election Law are certainly less drastic, and there is no reason to believe that they would not protect whatever interest the State of New York claims to have in the maintenance of "party integrity."

III. THE VOTING RIGHTS ACT OF 1965 AND THE 1970 AMENDMENTS

Section 1973aa-1 of the Voting Rights Act of 1965, (Pub. L. 89-110, 79 Stat. 437, 42 U.S.C.A. §1973, and the Amendments of 1970, Pub. L. 89-110, Title II, §201, as added Pub. L. 91-285, §6, 84 Stat. 315, 42 U.S.C.A. §1973aa) provides:

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; . . .

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President or Vice President in such election;¹⁰

Defendant's argument that the Voting Rights Act has no application to "primary voting for presidential nominating conventions," is answered in the text of the Act.¹¹ 42 U.S.C. §19731(c)(1) provides:

(c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any

¹⁰ The Twenty-sixth Amendment to the Constitution has also brought about a change in voter qualifications by lowering the voting age in all elections to 18. It does not appear that New York has as yet enacted statutory provisions to put these changes into effect, but compliance with the age requirement and the residency requirement (for the actual presidential elections) is evidently proceeding by means of instructions from the Secretary of State to the election boards.

¹¹ The legislative history shows that the Act was intended to apply to primary elections and particularly elections of delegates to party conventions. House Report No. 439, in explanation of the Definitions Section of the Voting Rights Act [42 U.S.C. §19731(c)(1)] states:

Clause (1) of this subsection contains a definition of the term "vote" for purposes of all sections of the act. The definition makes it clear that the act extends to all elections—Federal, State, local, primary, special or general—and to all actions connected with registration, voting, or having a ballot counted in such elections. The definition also states that the act applies to elections of candidates for "party" offices. Thus, for example, an election of delegates to a State party convention would be covered by the act. . . . U.S. Code Cong. & Admin. News 2464 (1965).

The Conference Committee adopted the House version of Subsection 14(c)(1). *Id.* at 2582.

primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election. (Emphasis supplied).

As stated earlier, delegates to the national nominating conventions will be elected in New York's June primary. These delegates are the direct link between the interests and opinions of the voters in the primary and the national candidates and platform selected at the national nominating conventions. In order for a voter to effectively participate in the selection process, he must be able to cast his vote in the primary also. It seems intuitively obvious to even the most casual observer that to deny or encumber the right to participate in primary elections is to restrict the right to participate in an integral and essential part of the electoral process.

It also needs little explanation that the waiting period mandated by the enrollment box system before an enrollment can become effective is a durational residency requirement.¹² This residency requirement may vary in duration from one to eleven months, depending on the time of year the enrollment blank is filled out and put in the box (registration and signing of enrollment blanks are closed during the thirty days before and after the general election). It is a durational residency requirement imposed

¹² It is noted that absentee balloting is not available in primary elections.

in *addition* to the ninety days residence required to vote in a general election.¹¹

The seven months' additional residence required of those voters who would be otherwise qualified to vote in the June primary constitutes a durational residence requirement as a precondition to voting for President and Vice President in excess of the thirty days allowed by the Voting Rights Act. As thus applied, the law is invalid. Const. Art. VI.

It might be noted that the constitutionality of the 1970 Amendments was challenged in *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260 (1970). A divided (5-4) Court found that the 18-year-old vote provisions of the Amendments are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections. The literacy test provisions were unanimously upheld, and the Court, by a vote of 8-1, held that Congress could set residency requirements and provide for absentee balloting in elections for presidential and vice presidential electors.

However, it is clear that the Supreme Court did not pass on the application of the Amendments, by the literal terms of the Act, to a primary election at which the delegates to the national nominating conventions would be elected. This Court must assume the constitutionality of the Act and its amendments until it is decided otherwise.

¹¹ Section 150 provides in part that

"[a] qualified voter is a citizen who is or will be on the day of election twenty-one years of age or over, and shall have been a resident of this state, and of the county, city or village for three months next preceding an election and has been duly registered in the election district of his residence. . . ." See footnote 10, *supra*.

IV. SUMMARY OF PRIOR PROCEEDINGS

The plaintiff initially moved for the convening of a three-judge court pursuant to 28 U.S.C. §2281, *et seq.* The defendants moved to dismiss the complaints pursuant to Rules 12(b) and 12(c) of the Rules of Civil Procedure. As previously noted, the plaintiffs withdrew the application to convene a three-judge court.

V. CONCLUSION

Defendants' motion to dismiss pursuant to Rules 12(b) and 12(c) is denied. Judgment is granted in favor of the plaintiffs and against the defendants declaring §186 of the Election Law of the State of New York unconstitutional.

The Clerk is ordered to enter judgment accordingly.

JACOB MISHLER
U.S.D.J.

Order Denying Hearing en Banc
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
72-1182 & 72-1183

STEVEN EISNER, on his own behalf and on behalf of all
 others similarly situated,

Plaintiffs-Appellees,

—v.—

NELSON ROCKEFELLER, Governor of the State of New York;
JOHN P. LOMENZO, Secretary of State of New York;
WILLIAM D. MEISSNER and **MARVIN D. CHRISTENFELD**,
 Commissioners of Elections for Nassau County,

Defendants-Appellants.

A petition for rehearing and supplemental petition for rehearing both containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petitions be and they hereby are denied. Judges Feinberg and Oakes dissent.

HENRY J. FRIENDLY
Chief Judge

April 24, 1972

Order Denying Stay

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

72-1182 & 72-1183

STEVEN EISNER, on his own behalf and on behalf of all
others similarly situated,

Plaintiffs-Appellees,

—v.—

NELSON ROCKEFELLER, Governor of the State of New York;
JOHN P. LOMENZO, Secretary of State of New York;
WILLIAM D. MEISSNER and **MARVIN D. CHRISTENFELD**,
Commissioners of Elections for Nassau County,

Defendants-Appellants.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

J. EDWARD LUMBARD
WALTER R. MANSFIELD
WILLIAM H. MULLIGAN

April 24, 1972

MAY 5 1972

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-~~1751~~
1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,
Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,
Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,
Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,
Respondents.

**MOTION FOR LEAVE TO FILE BRIEF OF LAWYERS FOR
McGOVERN, AMICUS CURIAE IN SUPPORT OF PETI-
TION FOR WRIT OF CERTIORARI AND OF MOTION
FOR SUMMARY REVERSAL OR, IN THE ALTERNA-
TIVE, FOR EXPEDITED CONSIDERATION ON THE
MERITS WITH BRIEF ATTACHED**

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INDEX

	PAGE
Motion for Leave to File Brief of Lawyers for McGovern, <i>Amicus Curiae</i>	1
BRIEF:	
REASONS FOR GRANTING THE WRIT AND FOR SUMMARILY REVERSING THE DECISION OF THE COURT BELOW	
I. The Decision Below Is in Violation of the First, Fourteenth, and Twenty-Sixth Amendments	6
A. Party raiding	8
B. Least Drastic Means Test	14
C. Twenty-Sixth Amendment	15
D. Dunn v. Blumstein	15
II. Immediate Relief Is Required	17
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

Bendinger v. Ogilvie, 335 F. Supp. 572 (N.D. Ill. 1971)	9
Dunn v. Blumstein, 92 S. Ct. 995 (March 21, 1972)	8, 12, 15, 16, 17
Fontham v. McKeithen, 336 F. Supp. 153 (E.D. La. 1971)	12, 13, 14

Gordon v. Executive Comm. of Democratic Party of City of Charleston, 335 F. Supp. 166 (D. S. Car. 1971)	10, 16
Lippitt v. Cipollone, 40 LW 3334 (Jan. 17, 1972)	8, 9
Oregon v. Mitchell, 400 U.S. 112 (1970)	6
Pontikes v. Kusper, — F. Supp. — (No. 71 C 2363, N.D. Ill. Mar. 9, 1972)	10
Reynolds v. Sims, 377 U.S. 533 (1964)	6
<i>Constitutional Provisions:</i>	
United States Constitution	
First Amendment	6, 8
Fourteenth Amendment	6
Twenty-Sixth Amendment	6, 8, 15
<i>Federal Statute:</i>	
P.L. 91-285, 84 Stat. 314	6
<i>State Statutes:</i>	
Ill. Rev. Stat., §7-43	11
N. Y. Election Law, §186	7, 8, 14, 15, 16
Ohio Rev. Code, §3517.013 <i>et seq.</i>	8

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1731

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
GOTTESMAN, individually and on behalf of all others
similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York,
JOHN P. LOMENZO, Secretary of State of The State of
New York, MAURICE J. O'ROURKE, JAMES M. POWER,
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Respondents.

**MOTION FOR LEAVE TO FILE BRIEF OF LAWYERS
FOR McGOVERN, AMICUS CURIAE IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI AND
MOTION FOR SUMMARY REVERSAL OR, IN THE
ALTERNATIVE, FOR EXPEDITED CONSIDERA-
TION ON THE MERITS**

Amicus Curiae, Lawyers for McGovern, respectfully moves pursuant to Rule 42 of this Court, for leave to file the attached Brief in Support of the Petition for Writ of Certiorari and Motion for Summary Reversal, or in the Alternative for Expedited Consideration on the Merits. (Counsel for petitioners and counsel for Nassau County have consented to the filing of this *amicus* brief and only the State of New York has refused to consent to its filing.) Lawyers for McGovern is an independent political committee formed under Article 13 of the New York State Election Law for the purpose of promoting the candidacy of George S. McGovern for the Democratic nomination for President. It is extremely concerned about the effect of Section 186 of New York's Election Law upon the qualification of approximately 500,000 young voters aged 18 to 21 who would be disenfranchised in the coming Presidential primary election to be held in New York State on June 20, 1972 if the Second Circuit's judgment were allowed to stand. It believes it can assist the Court in consideration of the Petition by submitting facts on the impact of the Second Circuit's decision on the right to vote of the 18 to 21 year old group and by pointing out to the Court recent court decisions on the problem of party raiding. It also supports Petitioners' request for immediate relief so that the eligible voters in the State may participate in this crucial election.

Wherefore *amicus* requests that the Court grant it permission to file the attached Brief in Support of the Petition for Writ of Certiorari and Motion for Summary Reversal,

or in the Alternative for Expedited Consideration on the Merits.

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Respondents.

**BRIEF OF LAWYERS FOR McGOVERN, AMICUS
CURIAE IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI AND MOTION FOR SUMMARY
REVERSAL OR, IN THE ALTERNATIVE, FOR
EXPEDITED CONSIDERATION ON THE MERITS**

REASONS FOR GRANTING THE WRIT AND FOR SUMMARILY REVERSING THE DECISION OF THE COURT BELOW

L

The Decision Below Is in Violation of the First, Fourteenth, and Twenty-Sixth Amendments.

This Court has made clear that the "right of suffrage is a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Ibid.*

In recent years, there has been a great expansion in the right to vote. Congress passed the Voting Rights Amendments of 1970, P.L. 91-285, 84 Stat. 314, lowering the minimum age of voters in both state and federal elections from 21 to 18. On December 21, 1970, this Court upheld the validity of the law insofar as it applied to federal elections. *Oregon v. Mitchell*, 400 U.S. 112 (1970). Congress immediately proposed the Twenty-Sixth Amendment to lower the age of voting in state elections to 18 years as well. It was submitted to the states on March 23, 1971. The requisite number of states quickly ratified the Amendment and by July 7, 1971, it came into force.

Thus in the past two years the federal government and the state governments as well have joined their efforts in expanding and protecting the right of 18 year old citizens to vote. For a restrictive state voting law to be applied

in such a way as to deny this new class of voters the right to participate in the Presidential primary would be to undercut all these recent efforts to expand the suffrage to this group.

Our investigations have indicated that there are at present in New York State approximately 500,000 eligible voters between the ages of 18 and 21 who would not be permitted to vote in the June 20, 1972 Presidential primary if the Second Circuit's decision is allowed to stand.* These young persons may be otherwise fully eligible and eager to vote in the coming primary. However, a tortured reading of Section 186 of the Election Law would bar them and others (lifelong members of one party who have changed the county of their residence within the state and wish to continue their party affiliation and voters moving into the state who wish to join the party of their choice) from participating in this crucial election.

The entire nation is concerned about enlisting our youth in the democratic process and insuring that they work "within the system" for a just and equitable society. Would not the 500,000 young persons barred from the coming election have some cynical thoughts about a process that keeps them from voting in this most important elec-

* The figure is determined as follows: In New York City there are approximately 385,000 eligible voters between the ages of 18 and 21. Only 127,400 registered to vote before October 2, 1971 leaving 257,600 ineligible to vote in the June primary under the Second Circuit's interpretation of Section 186. Calls to election boards throughout the state indicate the ratio elsewhere is approximately the same, e.g., Broome County (12,000 eligible; 3,966 registered); Oneida County (13,400 eligible; 4,395 registered) and Onondaga County (27,600 eligible; 9,500 registered). Since New York City's population is approximately half that of the state, we have doubled the New York City figures to estimate the total number disenfranchised.

tion on the basis of a law, purportedly preventing party raiding, that has nothing to do with their situation?

The court's decision below upheld the validity of Section 186, a provision which is the most drastic means possible to deal with the problem of party raiding. The law must be declared invalid for at least four reasons:*

(1) The evil it was designed to meet—party raiding—is not an evil at all and the law cannot be upheld on its own rationale.

(2) Even if it were legitimate to try to prevent party raiding, the means chosen by New York State casts too wide a net and restricts the votes of too many persons not trying to switch parties in any way.

(3) The law is contrary to the letter and the spirit of the Twenty-Sixth Amendment.

(4) The law amounts to an additional durational residence requirement beyond the term permitted by this Court in *Dunn v. Blumstein*, 92 S. Ct. 995 (March 21, 1972).

Each of these points will be discussed in order.

A. Party Raiding

The chief reliance of the Second Circuit was on *Lippitt v. Cipollone*, 40 LW 3334 (January 17, 1972) where this Court affirmed without opinion a decision of the Northern District of Ohio upholding a Ohio law which barred a candidate from switching parties for four years. The law, Ohio Rev. Code §3517.013 et seq. provides that "[no] per-

* Petitioners' brief sets forth very well the invalidity of the law under the First Amendment in terms of its violation of political associational rights and the right to travel.

son shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." The District Court upheld the validity of the law stating that it seeks "to prevent 'raiding' of one party by members of another party and to preclude candidates from '... altering their political party affiliations for opportunistic reasons.'" 40 LW 3334.

However, the *Lippitt* decision did not involve voters in any way. There may well be valid reasons for keeping certain restrictions on candidates who wish to switch parties but nothing in the *Lippitt* opinion would justify restrictions on voter participation. A recent decision by a three judge court in Illinois makes this point clear:

"The state's interest in limiting candidates from switching parties, as detailed above, is greater than its interest in limiting voters from switching parties. The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election. Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time to permit voters to do so." *Bendinger v. Ogilvie*, 335 F. Supp. 572, 576 (N.D. Ill. 1971).

In a case arising in South Carolina, a three judge federal court declared invalid a state law restraining voters

from making party changes which were less restrictive than those involved in the instant case. See *Gordon v. Executive Comm. of Democratic Party of City of Charleston*, 335 F. Supp. 166 (D. S. Car. 1971). A South Carolina law would not permit any voter to participate in a primary election if he had voted in a different party's primary election within the same year. The District Court held that one year was "such a lengthy disqualification [as to be] an unconstitutional limitation upon the voter's freedom of the ballot." 335 F. Supp. at 168.

The District Court equated the restriction with durational residence requirements which had been condemned as unconstitutional limitations on a citizen's right of suffrage:

"We can perceive no basic difference between a durational residence restriction and one which, using a like durational standard, bases the restriction upon the manner in which one had previously voted. No sound or compelling purpose can possibly justify 'locking' a citizen into a party and denying to him for a full year freedom to change parties. Such an arbitrary restraint upon the voter is both unreasonable and unconstitutional. Our system of government is based on the consent of the governed, and such consent is only illusory when voters are prevented by artificial restrictions for significant periods of time from changing political parties even though events or the actions of elected representatives may have convinced the voter that a change in party allegiance is warranted." 335 F. Supp. at 169.

In a similar case in the Seventh Circuit, *Pontikes v. Kusper*, — F. Supp. — (No. 71 C 2363, N.D. Ill. March 9, 1972) a three judge court in Illinois declared unconstitu-

tional a state law prohibiting any person from voting in a primary "if he shall have voted . . . at a primary . . . of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held. . . ." Ill. Rev. Stat. Section 7-43. The court said:

"The plaintiffs' attack against section 7-43(d) is grounded upon both the right of association and the right to vote. We agree that the 'twenty-three month rule' substantially burdens plaintiffs' right to vote in derogation of Article I, §2 of the Constitution. Those who have voted in the March 1971 primary of one party are now deprived of the right to vote in the March 1972 primary should they choose to switch parties at this time. Even voters eligible to vote in any primary this March are affected since they are forced to choose between their right to vote and their right to freely affiliate within the twenty-three month period following the election."

The court commented on the question of "raiding:"

"The interest which section 7-43(d) is claimed to protect is the state's interest in guarding against any distortions of the electoral process in general and in maintaining the integrity of the two-party system in particular. The statute serves these interests by preventing a practice known as 'raiding.' 'Raiding' occurs when members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate. But the statute sweeps too broadly, impeding both deceptive conduct and constitutionally protected activities. If section

7-43(d) were not in effect, massive party switching could occur either because of the well-planned raiding of one party's primary by members of another party, or because of massive dissatisfaction with the prevailing policies of an existing party. The state's interest upon which this statute is grounded could be characterized as 'compelling' only if the former alternative is more likely to occur than the latter, or if raiding constitutes a more important danger than the danger to constitutionally protected rights however often it occurs. There is no evidence to indicate that raiding is more likely to take place than 'honest' switches of affiliation. Forty-four states do not impose post-election restraints on changing affiliation. This would indicate that raiding is not a serious threat to the multi-party system."

The only case found that supports the Second Circuit's decision on the party raiding point is *Fontham v. McKeithen*, 336 F. Supp. 153 (E.D. La. 1971). That case upheld both the Louisiana durational residence requirement of one year and in one paragraph of its opinion upheld a six-month suspension of voter eligibility upon change of party affiliation. But the court's decision is directly counter to this Court's decision in *Dunn v. Blumstein*, *supra*. Judge Wisdom in dissent anticipated this Court's ruling in *Dunn* and said further about the six-month eligibility period:

"The waiting period is not well suited to keep malicious cross registrants out because, if they are truly bent on conquest, they need only plan ahead. A member of one party who wishes to vote for the weakest of the other party's primary candidates may still, even in Louisi-

ana, change his party affiliation six months in advance of the primary and cast his subversive vote. Louisiana's waiting period may tend to discourage fraudulent behavior since few voters are foresighted enough to conceive their scheme before election time. But the compelling interest test cannot be satisfied by the simple showing that a statutory scheme is conducive to an important state interest. The statute must provide strong assurance both that the discrimination it encompasses is necessary to accomplish the state's important purpose and that the statute does in fact accomplish that purpose. Here, the state has offered no evidence to demonstrate that the six month waiting period is any more than a rough, easily circumvented device which may reduce badly motivated crossovers, but only at the expense of the right to vote of countless other well-meaning citizens." 336 F. Supp. at 174.

Judge Wisdom continued:

"Louisiana's waiting period thus has the practical effect of locking in party members if they should decide that they prefer the candidates of another political party. This effect can be characterized as promoting the 'stability' of political parties. But our Constitution, happily, is more solicitous of the voter's right to cast his ballot for whomever he pleases than of the uncertain advantages to be gleaned from well-managed, well-structured political parties. It requires legislation which impairs a voter's right to vote for the candidate of his choice to be tested by the stringent compelling interest standard when other voters preserve their freedom to select their preferred candidate, as independent voters do in Louisiana. The compelling inter-

est test is appropriate because the discrimination is a telling deterrent to the First Amendment freedom to associate with others for the advancement of political beliefs." *Ibid.* at 174-75.

These cases make clear that party raiding, if an evil at all, does not justify inhibiting the right to vote. Accordingly, a law such as Section 186 whose sole purpose is to prevent raiding is unconstitutional.

B. Least Drastic Means Test

As Judge Wisdom pointed out in the *Fontham* case, party raiding laws which unduly restrict the franchise are an "unconstitutionally imprecise means of accomplishing the state's objective." Even if this Court upheld the proposition that voters from one party should not be permitted to cross-over at will to vote for candidates in another party, Section 186 does not accomplish this purpose in a constitutionally permissible way. For the law would prohibit from voting in a primary election (for a period of up to fourteen months) not only cross-over voters but the following groups as well:

- (1) newly registered voters who never belonged to any political party and are making their first choice of party.
- (2) lifelong members of one party who have changed the county of their residence within the state and wish to continue their party affiliation.
- (3) voters moving into the state who wish to join the party of their choice.

It is fair to say that Section 186 is the most drastic means devised by the state to meet the problem of party raiding. As such it cannot be permitted to stand.

C. Twenty-Sixth Amendment

The Twenty-Sixth Amendment specifies that the "right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." The Amendment expresses a distinct national policy to bring 18 to 21 year olds into the electoral process. Any restrictive state laws that effectively "abridge" this group's right to vote are in contravention of the express words of the Amendment.

It is plain that the chief effect of Section 186 is to disenfranchise this new group of voters numbering approximately 500,000. To enforce the law against them to deprive them of the right to vote in the June primary would be to undermine the purpose and the words of the new Amendment.

D. *Dunn v. Blumstein*

On March 21, 1972 this Court decided *Dunn v. Blumstein*, 92 S. Ct. 995 (1972). That decision declared unconstitutional the one year durational residence requirement of Tennessee and the three month residence requirement of the local county. The Court rejected the idea that residence requirements were necessary to prevent fraud in an election or to insure that knowledgeable voters participate in the franchise:

"As devices to limit the franchise to minimally knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some

citizens. We are aware that classifications are always imprecise. By requiring classifications to be tailored to their purpose, we do not secretly require the impossible. Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest." 92 S. Ct. at 1012.

The District Court in South Carolina in the *Gordon* case saw quite clearly that the ban on cross-over voting amounted to an additional residence requirement beyond that established by state law. From the perspective of the voter, durational restrictions may be less inhibiting than the ban imposed by Section 186. A new voter moving into the state on October 3, 1971 could not participate in party elections or affairs until February of 1973. Few if any states impose such a long residence requirement. If this Court felt that a 90 day county residence requirement was too long a restriction on the franchise, how can a fourteen month restriction be upheld?

II.

Immediate Relief Is Required.

For the reasons specified in the petition for certiorari there is a compelling need for immediate relief. Registration for the June 20, 1972 primary closes on May 20, 1972. Thus relief must be afforded before that date for this Court's decision to be meaningful. Otherwise hundreds of thousands of voters may be barred from participating in the primary on the basis of a law which may later be declared unconstitutional. The New York State authorities have never asserted that they cannot process the new voters who seek to register before May 20, 1972 or to enroll those new voters who registered previously for the party of their choice.

To effectuate the Constitution's most recent amendment and this Court's recent decision in *Dunn v. Blumstein*, the Second Circuit's decision must be reversed and the decision of the District Court reinstated. In reinstating the District Court's decision, this Court's mandate should make clear that all voters ages 18-21 and others who are ineligible for the June 20, 1972 primary solely because they were not registered on October 2, 1971, must be allowed to register and participate. The Assistant Attorney General handling this case for the State of New York has informed one of the attorneys filing this brief that the State of New York's position is that a reinstatement of the District Court opinion would only make the four petitioners in this case eligible to vote in the primary.

CONCLUSION

For the reasons stated above the petition for a writ of certiorari should be granted and the decision of the court below should be summarily reversed, or, in the alternative the matter scheduled for expedited consideration on the merits.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1371

U.S. COURT, U. S.
FILED

MAY 22 1972

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
GOTTESMAN, individually and on behalf of all others
similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of The State of New York,
JOHN P. LOMENZO, Secretary of State of The State of
New York, MAURICE J. O'ROURKE, JAMES M. POWER,
THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the
BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of
all others similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of The State of New
York, JOHN P. LOMENZO, Secretary of State of The
State of New York, WILLIAM D. MEISSNER and MARVIN
D. CHRISTENFELD, Commissioners of Elections for Nas-
sau County.

Respondents.

**BRIEF FOR STATE RESPONDENTS IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI AND
MOTION FOR SUMMARY REVERSAL AND EX-
PEDITED APPEAL**

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Involved	2
Statement of the Case	2
The Temporary Stay Should Be Vacated	5
Reasons for Denying Certiorari	6
A. The Court of Appeals has followed the Supreme Court's decisions protecting the right to vote by finding § 186 promotes a compelling state interest	6
B. § 186 does not infringe on the right to travel insofar as the petitioners present a constitutional claim	7
C. § 186 presents no substantial constitutional issue of freedom of speech or association	8
D. § 186 is not a "Grandfather Clause" in any regard and any such claim has been rejected at all levels	9
The Inappropriateness of "Summary Reversal"	11
Even Assuming Certiorari Should Be Granted the Court Should Not Expedite Its Consideration ...	11
Conclusion	14
Supplementary Appendix	1a

AUTHORITIES CITED

<i>Cases:</i>	PAGE
<i>Adickes v. Kress & Co.</i> , 398 U.S. 144, 147 (ftn. 1), 90 S. Ct. 1598 (1970)	8
<i>Bachrow v. Rockefeller</i> , 71 C. 930 (E.D.N.Y. 9/8/71)	3, 8
<i>Bass v. Westchester Co. Commissioners of Elections</i> , 72 Civ. 1644 (S.D.N.Y.)	12
<i>Bullock v. Carter</i> , — U.S. —, 40 U.S.L.W. 4211, 4215 (Feb. 24, 1972)	6
<i>Dunn v. Blumstein</i> , — U.S. —, 40 U.S.L.W. 4269, 4274 (March 21, 1972)	6, 7, 13
<i>Flemming v. Nestor</i> , 363 U.S. 603, 607 (1960)	5, 12
<i>Fontham v. McKeithen</i> , 336 F. Supp. 153, 162 (E.D. La. 1971)	9
<i>Lippitt v. Cipollone</i> , — U.S. —, 40 U.S.L.W. 3334 (Jan. 17, 1972) aff'ing 337 F. Supp. 4105 (N.D. Ohio 1971)	6
<i>Pontikes v. Kusper</i> , — F. Supp. — (N.D. Ill. Mar. 9, 1972)	12, 13
<i>Rockefeller v. Socialist Workers Party</i> , 400 U.S. 1201, vacated 3-Judge Court aff'd 400 U.S. 806 5, 12	

STATUTES

<i>New York Election Law</i> ,	
§ 186	2, 5, 7, 9, 10, 12
§ 187, subd. 2	3, 5, 8
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1258	13
§ 332	8

TABLE OF CONTENTS

iii

MISCELLANEOUS

	PAGE
New York Post, "Teen Vote Registration Lags", May 12, 1972, p. 1	10
Stern and Gressman, <i>Supreme Court Practice</i> (4th Ed. 1969, § 5.12	11

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PETITION FOR A WRIT OF CERTIORARI AND
MOTION FOR SUMMARY REVERSAL AND EX-
PEDITED APPEAL**

Opinions Below

In the courts below this case is, as yet, unreported. The
Court of Appeals opinion is presently found in the slip

sheet opinions of that Court at p. 2605 (No. 632, 633—September Term, 1971), and is also reproduced in the Petition for a Writ of Certiorari at pp. 2a-10a. The reversed opinion of Chief Judge MISHLER of the Eastern District of New York is 71 C. 1573, February 10, 1972 (Petition—pp. 11a-37a).

We have reproduced the reversed judgment of the District Court in our Supplemental Appendix, p. 1a.

Jurisdiction

The petitioners have relied on 28 U.S.C. § 1254(1) to invoke the jurisdiction of this court.

Question Involved

Does New York Election Law § 186 unconstitutionally deprive petitioners of the right to vote in the 1972 New York primary when they were eligible to timely do so before the last general election, but failed to so enroll?

The Court of Appeals, Second Circuit, answered "no".

Statement of the Case

Petitioners are all registered voters who were eligible to enroll in a political party under New York law before the last general election in November 1971. The Petition only discusses Stephen Eisner's factual situation although there are three *Rosario* petitioners. The *Eisner* complaint alleges only that Mr. Eisner attained 21 on December 30, 1970 and resides in Valley Stream, N. Y. On December 13, 1971, he registered to vote in Nassau County and allegedly completed an enrollment blank for the Democratic Party which was then deposited, under Election Law § 186, in a sealed box until after the next general election. Hence he

is not an enrolled Democrat for the 1972 primary. Any other facts alleged in the Petition, *Statement of the Case*, p. 6, are not in the complaint and therefore not part of the record.

Rosario—These petitioners are not discussed in the Petition. However, the complaint shows, that all three are new voters who registered in New York City on December 3, 1971, and allegedly enrolled in the Democratic Party. Mr. Rosario is 18, the other two over 21. All are ineligible to vote in the June 1972 primary, Election Law § 186, because they could have enrolled prior to the last general election.

The petitioners in both proceedings have apparently long resided in New York State, *e.g.*, petitioner Eisner for the last 15 years. They challenged the constitutionality of § 186 insofar as it prevented newly enrolled voters from voting in the June 1972 primary.* Complaints—*Rosario*, ¶ 7; *Eisner*, WHEREFORE ¶ 2.

Petitioner Eisner, while at most representative of the newly enrolled voter, purports to represent all persons "in the box". There are also two other major "classes" not involved in the instant cases: (1) persons seeking to change party affiliations and (2) newly arrived New York residents and persons who move from one county to another outside the City of New York after the last general election.

Petitioners also are not representative of newly enfranchised voters who have reached 18 since the last general election. They can specially enroll and vote in the New York primary—Election Law § 187, subd. 2. Petitioner

* The same attorneys had previously brought a similar case, *Bachrow v. Rockefeller*, 71 C. 930, Eastern District of New York. It presented the additional issue of an enrolled voter who moved from one county to another and was "in the box" as well as the issue of the newly enrolled voter. It was dismissed as moot, three-judge court, September 8, 1971, since there were no primary contests for those plaintiffs to vote in. No appeal was taken.

Eisner is not even representative of the 18-21 year olds enfranchised by the Twenty-sixth Amendment since he was 21 before its enactment.

In the District Court, the petitioners dropped their demand for any injunctive relief and applied solely for a declaratory judgment. The *Eisner* complaint did not request class action relief, Rule 23. The *Rosario* complaint did but the request was never pressed and no class action order was ever granted although Judge MISHLER in his opinion did call this a "class action", but even he limited the "class" solely to newly enrolled voters, Pet. p. 12a. The District Court consolidated the two actions, Rule 42A, and granted declaratory judgment declaring § 186 "totally" unconstitutional (see *infra*, Judgment, p. 1a).

On appeal by the State defendants and the Nassau County Board of Elections, the Court of Appeals for the Second Circuit unanimously reversed the District Court. Recognizing that New York had a compelling state interest in preventing party "raiding" and protecting party integrity, the opinion (LUMBARD, C. J.) found § 186 a reasonable regulation of the party primary process which could not be effected by less drastic means. Indeed it was praised as a highly effective part of New York's effort to minimize the possibility of debilitating political practices. The opinion used the high standard of "compelling state interest" in testing § 186. As noted, it met the test (Opinion and ftn. 4, Pet. p. 6a).

The petitioners sought reargument, *in banc* reconsideration and a stay of judgment* in the Court of Appeals. All were denied April 24, 1972.

The petitioners applied to Justice MARSHALL for a stay of the Court of Appeal's judgment April 24, 1972. It was granted temporarily April 26, 1972.

* This in spite of the fact they had dropped the demand for any type of injunctive or equitable relief below.

The Temporary Stay Should Be Vacated

The Court should not grant any stay of judgment, because the preserving of the *status quo* means allowing Election Law § 186 to operate for the 1972 primary, which is about a month away. The Court of Appeals has upheld the *status quo* in its decision. Its judgment only confirms it. In addition the petitioners cannot seek an injunction because they, four in number, truly represent only themselves. There is no Rule 23 class-action order nor did they seek one. As in *Flemming v. Nestor*, 363 U.S. 603, 607, 89 S.Ct. 1367 (1960), even an ultimate favorable declaration on the merits would have no effect apart from *stare decisis*. Furthermore, as previously noted, petitioners at the onset in the District Court deliberately eschewed any injunctive relief. Indeed, in an unusual maneuver, they withdrew the request for an injunction contained in their complaint in a short procedural appearance before the District Court Judge, obviously to deprive the State defendants of their right to a three-judge court, 28 U.S. §§ 2281, 2284, a procedure which we challenged before the Court of Appeals (Opin., fn. 2, Pet. p. 4a).

A stay of judgment is simply confusing an already complicated situation and is meaningless unless intended to reactivate the reversed District Court judgment. The temporary stay has no such effect. The petitioners have no standing to claim to represent prospective enrollees subject to Election Law § 186 for reasons other than failure to enroll in a political party prior to the preceding general election. New voters who have reached 18 since the last general election can enroll for the primary until May 20, 1972, Election Law § 187, subd. 2. A stay would violate the principles enunciated in *Rockefeller v. Socialist Workers Party*, 400 U.S. 1201 (HARLAN, J., 1970), vacated and three-judge court aff'd. 400 U.S. 806, where the late Justice issued a stay order to preserve the *status quo* pending the State's appeal.

Reasons for Denying Certiorari

- A. The Court of Appeals has followed the Supreme Court's decisions protecting the right to vote by finding § 186 promotes a compelling state interest.**

The Court of Appeals opinion is unassailable in finding a "compelling state interest" in protecting party integrity and preventing "raiding". Apparently the petitioners even concede this (Pet. p. 13). Indeed the recent affirmation in *Lippitt v. Cipollone*, — U.S. —, 40 U.S.L.W. 3334 (Jan. 17, 1972), of a three-judge district court, 337 F. Supp. 1405 (N.D. Ohio, 1971) compels it. This prevention of electoral fraud and protection of the integrity of political processes also is supported by several current decisions of this Court, namely, *Dunn v. Blumstein*, — U.S. —, 40 U.S.L.W. 4269, 4274 (March 21, 1972) and *Bullock v. Carter*, — U.S. —, 40 U.S.L.W. 4211, 4215 (Feb. 24, 1972). These were cited by the Court of Appeals (Pet. App. p. 6a). Yet petitioners have not hesitated (Pet. p. 12) to claim a direct conflict. The opinion below fully complies with recent decisions and standards. It certainly found, after careful analysis of the New York political system, that § 186 was not "overbroad" as to petitioners who are newly enrolled voters (Pet. App. pp. 8a-9a).

The petitioners claim that newly enrolled voters do not pose any substantial threat of organized large scale "raiding". We respectfully disagree. According to them, literally hundreds of thousands of persons are similarly situated. It does not take much extended consideration to see that they, as easily as party-switchers, can be organized to "raid". And today there are many groups, already well organized, which can easily engage in "raiding" or short-notice takeover of an established political organization.

Indeed a political organization "Lawyers for McGovern", organized to promote the candidacy of Senator

George McGovern for the Democratic Party nomination for President, has filed a motion to file an *amicus curiae* brief in support of petitioners.* We can only assume that they see the possibility of organizing, or have already organized, thousands of non-Democrats, from within and without existing political organizations, in a "raid" on the Democratic Party. Only § 186 stops them.

Raids can emanate not only from other parties but also from groups technically outside the traditional political process. New York has a compelling state interest in protecting the integrity of its political parties in this situation also.** That is why it is not necessary to differentiate between party-switchers and newly-enrolled voters such as petitioners.

B. § 186 does not infringe on the right to travel insofar as the petitioners present a constitutional claim.

The petitioners claim that § 186 is a durational residency requirement and apply *Dunn v. Blumstein, supra*, — U.S. —, 40 U.S.L.W. 4289 (Mar. 21, 1972). Simply stated, § 186 cannot be such a requirement because petitioners never lacked residency. They only failed to avail themselves of the opportunity to timely enroll. Therefore as to the petitioners there is no issue on the constitutionally protected right to travel. Indeed the petitioners never raised this issue below and it was not discussed in the several opinions. Where an issue is neither raised before

* We fail to see the interest of "Lawyers for McGovern" since their statement on page 2 of their Motion fails to state that any of their members are subject to § 186. We might note that no lawyer can be under 21 (New York Judiciary Law § 460).

** The Court of Appeals noted New York's particular interest in preventing raiding (Opin., Pet. pp. 5a-6a, fn. 3). Due to the two minority parties, Conservative and Liberal, having limited enrollments of hardly over 100,000 statewide, absent § 186, they would be very susceptible to raids from other parties or well organized, ostensibly non-political, groups.

nor considered by the Court of Appeals, this Court will ordinarily not consider them. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 (ftn. 1), 90 S. Ct. 1598 (1970).

Furthermore, this claim of right to travel can only be presented by a possible litigant who is a newly established New York resident or who has crossed county lines within New York since the last general election and the interests of such a class would not be adequately represented by petitioners because, except for subd. 6 to Election Law § 187, (special enrollments) any one in such a class would be entitled to enrollment up to 30 days before the primary. See Election Law § 187, subd. 2, which allows special enrollments for those who lacked residency requirements for voting at the time of the last general election. Subd. 6 limits this to the same county as a person resided in at the time of the last general election. The petitioners do not attack subd. 6 simply because its elimination would not assist them. To this extent the interests of petitioners and new residents or county-movers are antagonistic. Not being either of the latter, petitioners cannot present their claim which, it might be noted, was in the *Bachrow* case, *supra*, ftm. p. 3.

C. § 186 presents no substantial constitutional issue of freedom of speech or association.

The Court of Appeals at length noted that § 186 is carefully designed to infringe minimally on First and Fourteenth Amendment rights. The less drastic means advanced by the District Court and petitioners (Election Law § 332) were rejected by the Court below because "the use of § 332 to prevent raiding would be far too cumbersome to have any deterrent effect on raiding in a primary". Requiring an inquiry into a voter's mind, its use, in face of short-notice, large scale raiding would render party officials virtually impotent. While the Constitution and Supreme Court opinions require the State to use proper means to advance a compelling state interest, it

does not require that the State choose ineffectual means (Opinion, Pet. p. 9a).

"Balancing" or "less drastic means" mentioned by petitioners and by the District Court are not appropriate. The challenge procedures and criminal sanction, cited by the District Court's opinion, pages 26a-27a, are really not "less drastic". Regular recourse to criminal sanctions and court challenge procedures will, of necessity, in this area of primary voting, have an extremely more chilling effect on the exercise of First Amendment rights than § 186.

D. § 186 is not a "Grandfather Clause" in any regard and any such claim has been rejected at all levels.

Petitioners' discussion of "grandfather clauses" is inappropriate. Section 186 does not discriminate against 18-21 year olds or racial minorities. On the contrary, it is completely neutral. It has been around much longer than the Twenty-sixth Amendment and clearly was not passed to impair the newly enfranchised's right to vote. So, too, as to racial minorities and there is no allegation that petitioners are representatives of the class. Even the favorable (to petitioners) decision in the District Court did not think these arguments worthy of mention or discussion. Petitioners have engaged in unsupported speculations, which have no basis in the record. Why persons fail to register or enroll when eligible is always a mystery and to a large measure rests on the inaction of such individual, or the instant petitioners, in any particular case. See *Pontham v. McKeithen*, 336 F. Supp. 153, 162 (E.D. La. 1971).

The speculative numbers game engaged in by petitioners who claim 750,000 young failed to even register to vote, much less enroll in a political party, and the claim of 500,000 by *amicus* Lawyers' more elaborate, but still faulty statistics, all are not determinative of the underlying constitutional issues. Furthermore the large number of all

voters, but especially the young, who fail either to register to vote or enroll in a party is a matter of record. See Pet. p. 25. Thus in three major counties of the City (New York, Kings and Bronx) less than 50 percent of the persons of voting age residing therein voted in the presidential elections of November 1968.* This is unfortunate but it supports the conclusion that few voters who fail to even register to vote have a sufficient interest in politics to enroll in a party. Speaking of hundreds of thousands of voters being deprived of the right to vote is absurd. The basic unreliability of the figures presented by both the petitioners and *amicus* is that they make no attempt to inform this Court or us, by research or even estimate, how many persons' enrollments are "in the box" or suspended due to Election Law § 186.

Similarly ignored or overlooked is the important question of the extent to which such factors as motivation, disinterest or inertia may be responsible not only for the non-registration of eligibles in this 18-21 age bracket, but also in other age categories. In the former connection we note an article "Teen Vote Registration Lags", New York Post, May 12, 1972, p. 1. The gist of the item is that in spite of massive efforts, registration of teenagers for the primary is lagging far behind expectations.

In short, and without laboring the point, the number of non-registered eligibles in the 18-21 age group (whatever it may actually be) plainly has no relevance to any question of the claimed unconstitutionality of § 186. This is especially true where the alleged circumstance sought to be stressed by the *amicus* group—lawyers advocating a particular candidacy—fall exclusively within the 18-21 age bracket. Once again we note that all the petitioners had an opportunity to register and enroll, but failed to do so.

* This was the basis of the designation of those counties as subject to the Voting Rights Act of 1970, as amended 1970, and not the 1970 general election as inferred by the Pet., p. 25.

Also, as the Court of Appeals noted, ftn. 5, Pet. p. 9a, "New York does allow post-general election enrollment in certain cases. Section 187 of the Election Law allows late enrollment if, for example, the enrollee came of age after the last general election or if he was ill during the enrollment period. The import of section 187 is that New York is not opposed to later enrollment per se". Thus thousands of persons who attained 18 since the last general election can and will enroll to vote in the June 1972 primary but petitioners and *amicus* conveniently ignore this provision when playing the numbers game.

The Inappropriateness of "Summary Reversal"

The petitioners fail to discuss beyond citing Rule 35, the basis for a summary reversal. The reasons for denying certiorari make it clear, that the instant case is not "clearly controlled by one or more of [this Court's] own recent decisions". No special factors appear to warrant summary reversal. The practice is particularly unfair towards respondents Stern and Gressman, *Supreme Court Practice* (4th Ed. 1969), § 5.12 (pp. 220-222).

The petitioners by their own procedures necessarily precluded the possibility of more than one appellate review before the primary (see Memorandum of MISHLER C.J., February 17, 1972, p. 4 and Min. p. 10, Feb. 16, 1972—on Reargument). They apparently preferred the certainty of full Court of Appeals review and they succeeded.

Summary reversal has no application to the facts or law of the instant petition.

Even Assuming Certiorari Should Be Granted the Court Should Not Expedite Its Consideration

The petitioners claim they need expeditious relief. However, the voluntary dropping of the demand for injunctive relief by petitioners at the onset of litigation,

together with the conscious failure to affirmatively seek class action relief, shows that even in the event they are successful no rights will be enforceable but only a precedent for future use by others. Cf. *Flemming v. Nestor*, *supra*, 363 U.S. 603, 607, 80 S. Ct. 1367 (1960). The petitioners boldly speak for thousands they do not in any way represent. Even at this very moment, there is a case, brought in the Southern District of New York, seeking the convening of a three-judge court on a challenge to § 186. *Bass v. Westchester Co. Commissioners of Elections*, 72 Civ. 1644. While the result in that case would be a foregone conclusion based on the *Rosario* decision in our Circuit, apparently the plaintiff therein does not think the instant petitioners properly represent his interests and views the three-judge court as an important procedural step, one not lightly to be abandoned by a litigant.

Of course Supreme Court review on direct appeal would have been possible if the petitioners had followed the usual three-judge court procedure. As noted, *supra*, *Rockefeller v. Socialist Workers Party*, 400 U.S. 806; summary review is often appropriate to such appeals. However, the petitioners consciously rendered this impossible by going before a single judge in the District Court. The respondents herein expeditiously went on appeal to the Court of Appeals without serious objection from petitioners because all parties wanted an authoritative opinion and judgment binding throughout New York State. However, it took even the Second Circuit six weeks (February 24, 1972 to April 7, 1972) to render its opinion reversing the District Court due to the complicated issues presented. To ask the Supreme Court of the United States to review the Circuit in an even shorter period, since the primary election is June 20, 1972, seems absurd, to say the least unless the disposition is "certiorari denied."

Furthermore, the question of temporal restrictions on party enrollments has been quite recently the subject of litigation in other states. Thus *Pontikes v. Kusper*, —

F. Supp. — (N.D. Ill. Mar. 9, 1972), cited to the Court of Appeals by petitioners, struck down a two-year restriction on changes of party affiliation. There was a vigorous dissent. We are informed by counsel for the defendants-appellants that they have filed a notice of appeal in the District Court of Northern Illinois invoking the mandatory appellate jurisdiction of this Court on three-judge court judgments, 28 U.S.C. § 1253. The notice was filed April 17, 1972. We are further informed that a jurisdictional statement is being prepared and will be timely filed. Also we have learned that a similar statute in Rhode Island is going before a three-judge court. At this point a temporary restraining order has been denied. Finally there is a similar case in New Jersey.

It may very well be that this Court would want to consider all these cases together although the result in one does not necessarily control the others.* Certainly summary reversal or expedited hearing is not appropriate in considering this complicated issue, with national implications. If, after reviewing the petition for certiorari and this brief in opposition, the Court does grant certiorari, it should be done within the usual time patterns appropriate to Supreme Court practice. The event of the June 20, 1972 New York primary will not moot this case since the question will occur again. Cf. *Dunn v. Blumstein*, *supra*, fn. 2 at 40 U.S.L.W. 4270.

We submit that in fairness to all parties the motion for summary reversal or expedited consideration on the merits be denied and the Court should vacate the temporary stay of the Court of Appeals' judgment.

* Thus in Illinois the price exacted for a change of party allegiance is not voting in a primary for at least two years. New York and § 186 impose no such penalty. If the voter changes his enrollment before the preceding general election he votes in the primary of his choice the following year.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, May 22, 1972.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Judgment of District Court (Reversed).

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

No. 71-C-1573

**PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
GOTTESMAN, individually and on behalf of all others
similarly situated,**

Plaintiffs,

against

**NELSON ROCKEFELLER, Governor of The State of New York,
JOHN P. LOMENZO, Secretary of State of The State of
New York, MAURICE J. O'ROURKE, JAMES M. POWER,
THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the
BOARD OF ELECTIONS IN THE CITY OF NEW YORK,**

Defendants.

No. 71-C-1621

**STEVEN EISNER, on his behalf and on behalf of
all others similarly situated,**

Plaintiffs,

against

**NELSON ROCKEFELLER, Governor of The State of New
York, JOHN P. LOMENZO, Secretary of State of The
State of New York, WILLIAM D. MEISSNER and MARVIN
D. CHRISTENFELD, Commissioners of Elections for Nas-
sau County.**

Defendants.

**These actions having been consolidated by the court and
the court having by memorandum of decision dated this day**

Judgment of District Court (Reversed).

determined that § 186 of the Election Law of the State of New York contravenes the First and Fourteenth Amendments to the Constitution and is violative of the Voting Rights Act of 1965 as amended, insofar as it pertains to the June 1972 primary to be held in the State of New York, it is

ORDERED, ADJUDGED and DECREED that plaintiffs have judgment against the defendants declaring § 186 of the Election Law of the State of New York unconstitutional and violative of the Voting Rights Act of 1965 as amended.

Dated at Brooklyn, New York, this 10th day of February, 1972.

LEWIS ORGEL,
Clerk of the Court.

Approved and Ordered that it be entered

JACOB MISHLER,
U.S.D.J.

COPY

IN THE
Supreme Court of the United States
OCTOBER TERM, 1971
No. 71-1371

COURT, U. S.
FILED
MAY 25 1972

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN MAN, individually and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND MOTION FOR SUMMARY REVERSAL OR, IN THE ALTERNATIVE, FOR EXPEDITED CONSIDERATION
ON THE MERITS

PETITIONERS' REPLY MEMORANDUM

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INDEX

AUTHORITIES CITED

	PAGE
<i>Statutes:</i>	
California Election Code, §§22, 203, 311-312	3
Illinois Annotated Statutes, §§5-30; 7-43-45	2
Annotated Laws of Massachusetts, ch. 53, §§37, 38	2
Michigan Compiled Laws Annotated, §§168.570; 575-576	3
New Jersey Statutes Annotated, Title 19:23-45	2
Ohio Revised Code, §3513.19	3
Purdon's Pennsylvania Statutes Annotated, Title 25, §291 <i>et seq.</i>	3
Vernon's Annotated Texas Statutes, Title 9, Article 13.01a	2
<i>Cases:</i>	
<i>Dunn v. Blumstein</i> , — U.S. —, 40 U.S.L.W. 4269 (March 21, 1972)	5
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	6
<i>Gordon v. Executive Committee of Democratic Party</i> , 335 F. Supp. 166 (D. S.Car. 1971)	3

	PAGE
<i>Jordan v. Meisser</i> , — U.S. —, 40 U.S.L.W. 3398 (February 22, 1972)	6
<i>Lippitt v. Cippollone</i> , — U.S. —, 40 U.S.L.W. 3334 (January 17, 1972)	3
<i>Long Island Moratorium Committee v. Cahn</i> , 322 F. Supp. 559 (EDNY) aff'd 437 F.2d 344 (2d Cir. 1970)	4
<i>Pontikes v. Kusper</i> , — F. Supp. — (N.D. Ill., March 9, 1972)	3
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	6
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968)	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE
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Petitioners,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT AND MOTION FOR
SUMMARY REVERSAL OR, IN THE ALTERNATIVE,
FOR EXPEDITED CONSIDERATION ON THE MERITS

PETITIONERS' REPLY MEMORANDUM

Petitioners respectfully submit, pursuant to Rule 24(4), the within Reply Memorandum in support of their petition for a writ of certiorari and their motion for summary reversal, or, in the alternative, expedited consideration on the merits.

I.

New York asserts that it possesses a compelling state interest in imposing the drastic restrictions at issue herein upon petitioners' initial affiliation with a political party because even previously unaffiliated new voters, such as petitioners, may be organized pursuant to fraudulent "raiding" schemes.

New York's assertion that previously unaffiliated voters, such as petitioners, pose any meaningful threat of "raiding" is patently absurd.¹ Indeed, no other state has imposed restrictions upon previously unaffiliated voters which even approach New York's in severity.

For example, Massachusetts, Illinois, New Jersey and Texas all permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice.² California permits pre-

¹ Moreover, respondents, in asserting that it would be "raiding" for persons to encourage voters to enroll in a political party in order to support a candidate in the party's Presidential Primary, totally misconceive the nature of the primary process. Joining a political party in order to support its prospective nominee for President is not "raiding" and New York State possesses no compelling, or even legitimate, interest in inhibiting such an occurrence.

² See, *Annotated Laws of Massachusetts*, ch. 53, §§37, 38; *Illinois Annotated Statutes*, §§5-30; 7-43-45; *New Jersey Statutes Annotated*, 19:23-45; *Vernon's Annotated Texas Statutes*, Title 9, Article 13.01a.

vously unaffiliated voters to declare an initial party affiliation up to 53 days before a primary. *California Election Code*, §§22, 203, 311-312. Pennsylvania permits a previously unaffiliated voter to declare an initial party preference up to 50 days before a primary. *Purdon's Pennsylvania Statutes Annotated*, Title 25, §291 *et seq.* Michigan permits any registered voter to participate in the primary of his choice. *Michigan Compiled Laws Annotated*, §§168.570, 575-576. Even Ohio, renowned for the severity of its election laws,³ permits previously unaffiliated voters to declare an initial party affiliation immediately before a primary. *Ohio Revised Code*, §3513.19.

Thus, whatever the views of the various states on permitting established members of one party to switch their affiliation from one party to another (Compare, *Pontikes v. Kusper*, — F. Supp. — (N.D. Ill., March 9, 1972) and *Gordon v. Executive Committee of Democratic Party*, 335 F. Supp. 166 (D.S.Car., 1971) with *Lippitt v. Cippollone*, *supra*), no state, with the exception of New York, has deemed it necessary to impose crippling restrictions upon newly registered voters making an initial declaration of party affiliation.⁴

II.

Throughout its brief in opposition herein, New York has consistently misstated the facts and circumstances surrounding petitioners' decision to seek declaratory, as op-

³ See, e.g., *Williams v. Rhodes*, 393 U.S. 23 (1968); *Lippitt v. Cippollone*, — U.S. —, 40 U.S.L.W. 3334 (January 17, 1972).

⁴ It should, of course, be noted that a new voter's affiliation with a political party in New York, whenever it occurs, must be preceded by his signing a loyalty oath (*Election Law*, §174) and may be policed by a summary expulsion procedure (*Election Law*, §332).

posed to injunctive, relief in the District Court. Those facts and circumstances are accurately recited by Chief Judge Mishler in his Supplemental Opinion Denying Re-argument, which is reproduced herein as Petitioners' Supplemental Appendix.*

From the inception of the proceedings herein it was petitioners' hope to remove the absolute barrier to party enrollment posed by Section 186 as quickly as possible in order to encourage meaningful registration campaigns prior to New York's June primaries. Accordingly, when Chief Judge Mishler indicated that a decision herein might be expedited were the case to proceed before a single District Judge (Supp. App. 3a), petitioners' counsel were delighted to withdraw their request for injunctive relief, thus rendering a three-judge Court unnecessary (Supp. App. 4a).*

Unfortunately, petitioners' hopes to remove the impediment to enrollment posed by Section 186 as quickly as possible in order to encourage registration among newly enfranchised voters were dashed by New York's decision to seek a Second Circuit stay of Chief Judge Mishler's February 10, 1972, opinion pending appeal. The stay,

* Respondents have studiously avoided all reference to Chief Judge Mishler's Supplemental Opinion in their Brief in Opposition.

* In all candor, in New York State, in cases of this sort, little practical advantage is gained by seeking injunctive, as opposed to declaratory, relief, since in counsel's combined experience, no New York State election official has ever refused to comply with the declaratory judgment of a Federal Court. Indeed, the identical procedure was followed by counsel herein in *Long Island Vietnam Moratorium Committee v. Cahn*, 322 F. Supp. 559 (EDNY), *aff'd* 437 F.2d 344 (2nd Cir. 1970), appeal pending, when it no longer appeared that injunctive, as opposed to declaratory, relief was required.

granted on February 22, 1972, coupled with the panel's subsequent reversal of Chief Judge Mishler on April 7, 1972, resulted in the continued refusal of New York election officials to permit newly enfranchised young voters to qualify to vote in the June Presidential Primary. Such a continued refusal, quite predictably, exerted a highly effective deterrent upon registration.

Thus, the "massive efforts" cited by the State respondents to register newly enfranchised young voters consisted of exhorting them to register, while simultaneously informing them that even if they registered, they would be ineligible to vote in the June Presidential Primary. The predictable reaction to such an exercise in political cynicism has been the "lag in teen vote registration" so bemoaned by the State respondents.

III.

Respondents assert that although Section 186 concededly bars all persons who have established a residence in New York since the last general election in November, 1971 from voting in the June, 1972 primaries, petitioners lack standing to urge the obvious conflict between Section 186 and *Dunn v. Blumstein*, — U.S. —, 40 U.S.L.W. 4269 (March 21, 1972). However, petitioners, as otherwise qualified voters who are concededly barred from voting in the June, 1972 Presidential Primary solely because of the operation of Section 186, possess unquestioned standing to attack the statutes' deferred enrollment procedures and to raise all arguments demonstrating their unconstitutionality. Once a prospective voter is demonstrably injured by the operation of a statute restrictive of the franchise, he must be permitted to demonstrate that the statute's unconstitutional impact is felt across the entire spectrum of

the electorate, cf. *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940); *Flast v. Cohen*, 392 U.S. 83 (1968).

Moreover, New York's attempt to prevent the obvious conflict between Section 186 and *Dunn v. Blumstein*, *supra*, from being considered by this Court is particularly inappropriate since in *Jordan v. Meisser*, — U.S. —, 40 U.S.L.W. 3398 (February 22, 1972), New York inadvertently mis-stated the impact of Section 186 and represented to this Court that newly arrived residents of New York would not be inhibited from voting in the June primaries by the operation of Section 186. Acting upon New York's inadvertent misrepresentation, this Court dismissed the *Jordan* appeal. Now, having conceded that Section 186 *does* bar newly arrived residents of New York from voting in the June primary, New York seeks by a hyper-technical application of the standing doctrine to once again insulate its patently unconstitutional statute from judicial review.¹

IV.

Finally, New York urges that expedited consideration or summary reversal be denied herein.

New York argues that a decision herein prior to the June primaries would have little practical effect because

¹ New York's assertion that the impact of *Dunn v. Blumstein*, *supra*, upon Section 186 was not presented to the Courts below in incorrect. The "residence requirement" cases were exhaustively briefed by petitioners in both the Courts below and Chief Judge Mishler explicitly noted that Section 186 acted as an unlawful durational residence requirement (App. 35a-36a). The Second Circuit elected to ignore the residence requirement issue after holding that the Voting Rights Act of 1970 did not apply to primaries (App. 10a). Its inexplicable failure to heed petitioners' requests to measure Section 186 against *Dunn v. Blumstein*, *supra*, cannot deprive this Court of its appellate jurisdiction.

as a declaratory judgment action on behalf of four individual voters, it would not be complied with by other election officials across the state. Of course, New York ignores the fact that Chief Judge Mishler explicitly designated the consolidated cases as class actions (App. 12a). However, even if these actions were merely declaratory judgments on behalf of four individuals, the Attorney General's speculation that the decision of this Court would be ignored in New York State is absolutely astonishing. It is plain to *all* counsel involved in this case that should this Court reverse the decision of the Second Circuit and reinstate Chief Judge Mishler's declaratory judgment, the unquestioned result in New York State would be the immediate eligibility of all voters who registered and enrolled for the first time in New York between October 3, 1971 and May 20, 1972 to participate in the June Presidential Primary. Thus, the eligibility of literally tens of thousands of concededly qualified *bona fide* voters to vote in the June primary turns on the grant or denial of expedited relief herein.

Respectfully submitted,

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Supplemental Opinion Denying Reargument

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 71-C-1573

PEDRO J. ROSARIO, *et al.*,

Plaintiffs,

—against—

NELSON ROCKEFELLER, etc., *et al.*,

Defendants.

No. 71-C-1621

STEVEN EISNER, etc.,

Plaintiffs,

—against—

NELSON ROCKEFELLER, etc., *et al.*,

Defendants.

MEMORANDUM OF DECISION AND ORDER

February 17, 1972

The defendants, by order to show cause, move to reargue the decision of this court and the order entered thereon made and dated February 10, 1972 on the grounds of (1) lack of jurisdiction of a single district judge to declare

§186 unconstitutional, and (2) abuse of discretion in granting declaratory judgment.

The court did not overlook the issue now raised. The decision made reference to the withdrawal of the motion for the convening of a three judge district court and noted that plaintiffs had withdrawn their application for that relief. Because of what had transpired, as will be hereinafter described, the court assumed that the parties agreed that a single judge district court would pass on the issue of the unconstitutionality of §186 of the Election Law of the State of New York.

The Rosario complaint prayed for (1) convening a three-judge district court, (2) declaring §186 unconstitutional and (3) granting "plaintiffs appropriate equitable relief to assure their participation in the 1972 primary elections scheduled for June 1972".

On December 6, 1971, the day of the filing of the complaint, an order was signed directing the defendants to show cause why a three-judge district court should not be convened pursuant to 28 U.S.C. §2281. The motion was returnable on December 17, 1971. In the meantime and on December 15th, Eisner filed a complaint praying that the court declare §§117 and 186 of the Election Law of the State of New York unconstitutional and praying for appropriate equitable relief to enforce "plaintiff's right to participate in the New York State Presidential Primary scheduled for June 20, 1972". A motion was made for a three-judge district court returnable on December 17, 1971. Defendants served a notice of motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief may be granted. [Rules 12(b)(1), 12(b)(6) and 12(c)].

On the return day of all the motions, i.e., December 17, 1971, there was discussion in open court among Seymour Friedman, attorney for plaintiffs Rosario, et al., Burt Neuborne, attorney for plaintiff Eisner, et al., A. Seth Greenwald, an Assistant Attorney General of the State of New York, J. Kemp Hannon, an attorney representing the Nassau County Board of Elections and J. Lee Rankin (by Mr. Gensler), representing The City of New York, concerning the advisability of convening a three-judge district court in the light of the time schedule for appellate review prior to June 20, 1972.

In *Bachrow v. Rockefeller*, 71-C-930, a three judge district court on September 8, 1971 dismissed a challenge to §186 for mootness.¹ The same lawyers participated in *Bachrow*. The undersigned was a member of the three judge district court.

Since Christmas vacations were about to commence and a delay in convening a three judge district court was a possibility, all the lawyers agreed that a more expeditious appellate review could be realized if the determination on the constitutionality of §186 were determined by the undersigned as a single district court judge. Thereupon the plaintiffs agreed to withdraw their request for injunctive relief. The Court wrote an order to that effect which stated that the action is "solely one for declaratory judg-

¹ In its memorandum of decision, the court, noting the difficulty in securing a determination, cited the dissenting opinions in *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 20 (1969) in the following language:

"Although the time periods involved may make it difficult to secure a decision and review of any given situation before a specific election takes place (see the dissenting opinions in *Hall v. Beals*, *supra*), it does not seem that a diligent plaintiff would find such a task impossible."

ment". Messrs. Friedman, Greenwald and Gersler signed their consent to that order.²

Thereafter briefs were served and filed by all the parties. The constitutional points were argued in the briefs. None of the parties argued the question of jurisdiction. The defendants now argue that the stipulation does not "amount to a consent on the part of the defendants above to jurisdiction or the propriety of the granting of a sweeping declaratory judgment by a single judge in a case of this nature." (Defendants' Memorandum of Law, p. 1)

The parties cannot confer jurisdiction on this court. The power of the court to act cannot therefore be based upon the consent of the defendants. Rather, the court has recounted the history of this proceeding as an answer to the defendants in charging an abuse of discretion in deciding this case as a single district court judge. The defendants' claim of an abuse of discretion in granting a declaratory judgment as provided in 28 U.S.C. §2201 is rejected in view of the conduct of the defendants' counsel described herein at length.

² The consent reads as follows:

"

12/17/71

On consent of the parties hereto the prayer for relief is amended by eliminating paragraph (3) of the prayer for relief and the action is solely one for declaratory judgment.

So ORDERED

s/ Jacob Mishler
U.S.D.J.

Consent

s/ Seymour Friedman

J. Lee Rankin, Corp. Counsel

s/ by Att Gersler

Louis J. Lefkowitz by

s/ A. Seth Greenwald

The power of a single-judge district court to determine constitutional questions is stated in *Rosado v. Wyman*, 397 U.S. 397, 402; 90 S.Ct. 1207, 1212-13, as follows:

"Jurisdiction over federal claims, constitutional or otherwise, is vested exclusively or concurrently, in the federal district courts. Such courts usually sit as single-judge tribunals."

The district court is a court of limited jurisdiction. Jurisdiction to decide questions involving the deprivation of civil rights granted under the Constitution is found in 28 U.S.C. §1343.¹

The power to decide constitutional questions in the first instance is in the federal district court. Congress has seen fit to limit that power by denying a single judge the right to issue "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . ." (28 U.S.C. §2281).

The defendants would extend that limitation to an action for declaratory judgment where the effect of that judgment would be identical to that of an injunction. *Rosado v. Wyman*, 304 F.Supp. 1350, 1352 (E.D.N.Y. 1969), [Weinstein, D.J.].

¹ The pertinent portion of 28 U.S.C. §1343 recites:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948, c. 646, 62 Stat. 932."

Chief Judge Lumbard's concurring opinion in *Rosado v. Wyman*, 414 F.2d 170, 184 (2d. Cir. 1970), made the following observation with reference to the same issue:

"That the state statute could be held unconstitutional in a declaratory ruling by the single judge seems settled. See ALI Study of the Division of Jurisdiction Between State and Federal Courts 245 (Tent. Draft No. 6, 1968), recommending that such a declaratory judgment requires a three-judge court but noting: [T]he requirement is here extended to cases seeking only a declaratory judgment, a remedy which was unknown in 1910. Three judges are not now needed in such a case. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154-55, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Flemming v. Nestor*, 363 U.S. 603, 606-607, 80 S.Ct. 1367, 4 L.Ed. 2d 1435 (1960).

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554 (1963) defined the power of a single district court judge to declare a federal statute unconstitutional.* In *Mendoza-Martinez*, the plaintiff brought an action in the district court seeking to have §401(j) of the Nationality Act of 1940 declared unconstitutional. That act deprived a citizen, who remained out of the country for the purpose of avoiding the draft, of his citizenship. The Court said:

"The present action, which in form was for declaratory relief and which in its agreed substance did not contemplate injunctive relief, involves none of the dangers to which Congress was addressing itself. The

* 28 U.S.C. §2282 places the same limitation on the power of a single district court judge with reference to the enforcement, operation or execution of any Act of Congress as 28 U.S.C. §2281 places on the power with relation to any state statute.

relief sought and the order entered affected an Act of Congress in a totally non-coercive fashion. There was no interdiction of the operation at large of the statute. It was declared unconstitutional, but without even an injunctive sanction against the application of the statute by the Government to Mendoza-Martinez. Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute. That being the case, there is here no conflict with the purpose of Congress to provide for the convocation of a three-judge court whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained. Thus there was no reason whatever in this case to invoke the special and extraordinary procedure of a three-judge court." 372 U.S. at 155, 83 S.Ct. at 560-61.*

Were the court to accept the defendants' argument, then the result would be that no single judge district court would have the power to entertain an action for a judgment declaring any statute unconstitutional. The restraining effect of a declaratory judgment which defendants describe would be present in every case to a greater or lesser de-

* The Circuits have generally understood *Mendoza-Martinez* to approve the power of a single district judge to declare statutes unconstitutional. See, *Merced Rosa v. Herrero*, 423 F.2d 591 (1st Cir. 1970); *United States v. Southern Ry. Co.*, 380 F.2d 49 (4th Cir. 1967); *Wilson v. Gooding*, 431 F.2d 855 (5th Cir. 1970); *Briscoe v. Kasper*, 435 F.2d 1046 (7th Cir. 1970); *Sellers v. Regents of the University of California*, 432 F.2d 493 (9th Cir. 1970); But See *Jeannette Rankin Brigade v. Chief of the Capitol Police*, 421 F.2d 1090 (D.C. Cir. 1969) [Bazelon, C.J., dissenting]. See criticism of *Mendoza-Martinez* in *Currie, The Three-Judge District Court in Constitutional Litigation*, 32 U. Chicago L. Rev. 1 (1964).

gree, since statutes are of a wide, general application and must necessarily have an effect beyond the parties to the litigation.

The Congress may further limit the power of a single district judge by denying them the right to declare state or federal statutes unconstitutional. It has not seen fit to do so.

This court has the power to declare §186 unconstitutional and finds it appropriate to exercise such power in this case.

The motion to re-argue is in all respects denied, and it is

So ORDERED.

JACOB MISHLER

U.S.D.J.

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MAY 27 1972

MICHAEL PODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County.

Respondents.

BRIEF FOR RESPONDENTS, COMMISSIONERS OF ELECTIONS FOR NASSAU COUNTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO MOTION FOR SUMMARY REVERSAL AND TO EXPEDITED APPEAL.

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statement of the Case	2
POINT I—The Court of Appeals' decision is in accord with this Court's decisions	4
POINT II—The relief sought by the petitioner is too broad	6
POINT III—"Delayed enrollment" is not an abridge- ment of the right to travel	7
POINT IV—Expeditious relief should not be granted	9
Conclusion	10

IN THE
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OCTOBER TERM, 1971

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Petitioners,

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Respondents.

BRIEF FOR RESPONDENTS, COMMISSIONERS OF ELECTIONS FOR NASSAU COUNTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO MOTION FOR SUMMARY REVERSAL AND TO EXPEDITED APPEAL.

Statement of the Case

Plaintiff Stephen Eisner is a duly registered voter in the County of Nassau and is 22 years of age. He first became eligible to register to vote and to enroll in a political party on December 30, 1970, when he attained his 21st birth-

day. Plaintiff, however, failed to exercise his privilege to register to vote and his privilege to enroll in a political party for almost an entire year. If he had exercised his right to register and to vote during 1971, he would now be eligible to vote in the June 1972 primary.

During the period from Eisner's 21st birthday until the last day on which plaintiff could have enrolled so as to be eligible for the June 1972 primary, the Nassau County Board of Elections was open for the purposes of registration and enrollment at the following times:

1. From January 1, 1971, to August 14, 1971, during business hours five days a week.
2. On September 30, October 1 and October 2, 1971, at Eisner's local polling place in Nassau County.
3. At various locations throughout the County, including several nearby to Eisner's residence, when the Nassau County mobile registration unit was opened for local registration.
4. If Eisner was unable to register by the above means, the provisions of New York *Election Law* § 153-a were available to the plaintiff for absentee registration.*

Plaintiff Eisner, however, failed to exercise his privilege to register and enroll during 1971, and on December 13, 1971, he visited the Nassau County Board of Elections and registered to vote. He therefore qualified to cast a ballot at the November 1972 general election November 7, 1972. After registering to vote, he completed an enrollment blank and deposited the same in a sealed box which is maintained solely for the receipt of completed enrollment blanks.

* Plaintiff's assertion in his petition at 6 n. 1 that such enrollment was not possible is erroneous.

The usual rule thereafter is that the enrollment blanks are not removed from the sealed box until the Tuesday following the next general election (*Election Law*, §186). Exceptions to the usual rule are provided for in *Election Law* § 187, whereby those eligible for "special enrollment" have their choice, as to a political party, placed immediately upon the enrollment register. They may immediately partake in all the activities of the party of their choice. If plaintiff Eisner had enrolled in the nine-month period prior to the general election in 1971, he would have been eligible for "special enrollment" and could have even voted in the September 1971 party primary (*Election Law*, § 187[2][a]), besides now being eligible to participate in the June 1972 primary.

Mr. Eisner's failure to register when he was eligible for special enrollment, and non-qualification to be eligible by special enrollment under any of the other provisions of Section 187 of the *Election Law*, now place him under the operation of Section 186. Because of this close inter-relationship of Sections 186 and 187, one section cannot be considered unless the operation of the other is also weighed.

The Election Law of New York therefore sets out a registration procedure which enables all eligible voters to easily qualify to cast their ballot in a general election. The Election Law also sets forth a simple enrollment qualification involving the principle of "delayed enrollment" (§186) with certain logical exceptions, i.e., "special enrollment" (§187).

POINT I

The Court of Appeals' decision is in accord with this Court's decisions.

The ultimate goal sought by petitioners herein is participation in a party primary election. The fundamental

right of voting in a general election is not involved in this case.

A primary election is inherently different from a general election in New York as New York has a "closed primary" (See 25 Am. Jur. 2d, Elections, §148). Discrimination is involved in the very nature of a closed primary in that only enrolled members of a political party may participate in that party's primary.

This Court has held, for general elections, that "states have the power to impose reasonable citizenship, age and residency requirements on the availability of the ballot". *Kramer v. Union Free School District*, 395 U. S. 621, 625.

For a primary election, open only to members of one political party, additional qualifications are necessary in order to insure that *bona fide* adherents of a party participate in that party's primary.

Unless some test for genuine adherence is utilized, there is always the danger of one party raiding another one party. New York has four statutory (Election Law §2(4)) political parties: Conservative, Democrat, Liberal and Republican. The Conservative and Liberal parties each have slightly over 100,000 enrollees while the Republican party has approximately 3,000,000 enrollees and the Democratic party has approximately 3,500,000. The possibility of a raid is ever present, especially because the "minor" parties at times can represent the deciding votes in elections; or, as is presently the case, can represent a balance of power in the State Assembly; and their nomination has even been the vehicle for election to a major post as was the case with the Liberal Party nomination in the 1969 New York City Mayoralty election and with the Conservative Party nomination in the 1970 United States Senate election.

New York's additional qualifications involve the completion of an enrollment blank (Election Law §174) and

deferment in participation until after the occurrence of the next general election. Such procedure is a minimal requirement for demonstrating party allegiance. The petitioners' suggested alternative, the use of the *Election Law* §332 hearing, would involve a large number of hearings to be reviewed by a court (on the question of an individual's political beliefs) if it were to be used as a substitute for "delayed enrollment." Such procedure would be cumbersome and unlikely to act as a deterrent to raiding. It could also be the chilling instrument of abuse against genuine party insurgents.

New York's delayed enrollment procedure is actually a minimal procedure which is precisely tailored to accomplish its goal.

It should be noted that delayed enrollment has logical exceptions for those who would be the least likely to participate in such raiding. These exceptions, embodied in section 187 of the *Election Law*, allow, *inter alia*, new voters to participate fully in a political party as soon as they attain voting age (§187[2][a]).

POINT II

The relief sought by the petitioners is too broad.

The scope of the relief sought by the petitioners should be limited to those who are in a similar situation to the petitioners, namely, those who were eligible for special enrollment because they had attained voting age since the last general election (*Election Law* §187[2][a]), but did not avail themselves of the opportunity to do so, so that now they must follow the general requirements of Section 186 of the *Election Law*.

Factually, the petitioners fall far short of challenging New York's delayed enrollment system, since they are

neither cross-over enrollees nor are they newly established residents of the County.* Moreover, the petitioners do not even represent that class of which they are a member, as the action they brought was simply for a declaratory judgment; it was not brought pursuant to Federal Rule 23.

These limitations on their non-representation of a class also demonstrate the inappropriateness of their motion for summary reversal.

POINT III

"Delayed enrollment" is not an abridgement of the right to travel.

The petitioners challenge delayed enrollment on the basis that it requires those who have recently established a residence to wait until the next general election for their enrollment to become effective. Such a challenge, however, is anomalous in that none of the petitioners herein fall under such a description. Moreover, this was the sole question in *Jordan v. Meisser, supra* which this Court has dismissed for lack of a substantial federal question.

* This Court, in *Jordan v. Meisser, et al.*,—U.S.—, 31 L Ed.2d. 92, 40 U.S.L.W. 4213, dismissed, for want of a substantial federal question, was an attack on Sections 186, and 187 by a new resident of Nassau County. The effect of the Court's dismissal has been the subject of debate in this case, inasmuch as the MOTION TO DISMISS OR AFFIRM by the Attorney General of the State of New York had inadvertently asserted appellant Jordan's right to special enrollment by Election Law Section 187(2)(c), whereas the MOTION TO DISMISS OR AFFIRM by the County Attorney of Nassau County had correctly cited the bar of Election Law §187(6) to Mr. Jordan, which thus placed him under the operation of Election Law §186, and thus also raised the identical questions presented in the instant case. It is our contention that the dismissal in *Jordan, supra*, was on the merits (STERN AND GRESSMAN, *Supreme Court Practice* (4th Ed. 1969) §5.18 at 233) and should control in the instant case.

The petitioners cite Chief Judge Mishler's decision, which noted that the wait involved, because of delayed enrollment, varied in duration from one to eleven months (*Pet. brief*, p. 14, n. 8; also referred to at *Pet. brief*, p. 18). The delay resulting from *Election Law* §186 is not a result of a durational residence requirement, rather, it is due to the inherent delay which results from the fact that only one primary and only one general election are held each year. Indeed, petitioner Eisner, had he specially enrolled when he first became of voting age on his 21st birthday in December of 1970, would have had to wait over nine months until he could have participated in the only primary in New York in 1971, the one held on September 14, 1971. Therefore, delayed enrollment is not a durational residence requirement rather, it is a minimal safeguard against unwarranted political chicanery; it prevents electoral fraud and the integrity of its political processes—goals which this Court has upheld in two recent cases, *Dunn v. Blumstein*, —U.S.—, 31 L Ed.2d 274, 40 U.S.L.W. 4269, 4274, *Bullock v. Carter*, —U.S.—, 31 L Ed.2d 92, 40 U.S. Law Week 4211, 4215.

The concept of a "grandfather clause" has no applicability to delayed enrollment. The petitioners have alleged that "New York has established a 'grandfather clause' which conditions full participation in the 1972 Presidential election upon past participation in 1971 local elections." *Pet. brief*, p. 23. This premise of the petitioners misconstrues New York's Election Law, inasmuch as there is no requirement that the petitioners had to have been involved in the 1971 local elections. All that is required is that an individual's registration and enrollment have taken place prior to the 1971 general election. No requirement is made as to actual participation in the 1971 election, however, and under the provisions of permanent personal registration (Article 15, Election Law), which has been adopted in the County of Nassau and in many other counties of

New York State, including the five counties which make up New York City, it is expressly envisioned that an individual need not vote at each general election in order for his registration to remain continuously in effect. Instead, under *Election Law* §352, as long as an individual votes in a general election "at least once in each period of two successive calendar years", he remains qualified to vote.*

The contention of the plaintiffs that delayed enrollment has an adverse effect upon unregistered members of a racial or ethnic minority is a *non sequitur*. Beginning from the premise that because fewer than fifty per cent of the qualified voters in New York, Kings and Bronx Counties participated in the 1970 general elections, the petitioners conclude that delayed enrollment perpetuates their exclusion from the democratic processes by rendering them ineligible to vote in the June primaries. There is no provision under New York's Election Law whereby the casting of a ballot in a general election would provide eligibility for participation in a subsequent primary. Thus, eligibility for the June primary is conditioned not on the prior casting of a ballot, but rather the timely completion of an enrollment blank.

POINT IV

Expeditions relief should not be granted.

The principle of "delayed enrollment" is a key provision in New York's Election Law, and involves a major policy decision in a state where a vigorous *four* party process exists.

* Intra-county changes of residence require a new registration, but not a new enrollment; inter-county changes of residence require both a new registration and re-enrollment.

Judicial scrutiny of such provisions is always welcome to insure that an individual's constitutional rights are protected; yet consideration of "delayed enrollment", under hurried conditions and motivated by partisan purposes (as is evidenced by the brief of the Lawyers for McGovern), is not a procedure which will allow full and complete consideration of all issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Mineola, New York

May 23, 1972

Respectfully submitted

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IN THE

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14 19

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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INDEX

	PAGE
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
The Operation of New York's Statutory Scheme Regulating Affiliation With a Political Party	4
Statement of Case	8

SUMMARY OF ARGUMENT

I. New York's Refusal to Permit Petitioners to Vote in a Primary Election Unless They Enrolled in a Political Party at Least 30 Days Prior to the Last Preceding General Election Constitutes an Unlawful Abridgment of the Franchise	11
A. The Right to Vote in a Primary Election Is an Integral Part of the Right to Vote	11
B. State Action Restrictive of the Franchise Must Advance a Compelling State Interest by the Least Drastic Means	11
C. New York's Deferred Enrollment Scheme Does Not Advance a Compelling State Interest by the Least Drastic Means	12
1. New York May Not "Lock" a Voter Into an Unwanted Pre-Existing Political Affiliation	12
2. New York May Not "Lock" Previously Unaffiliated Voters Out of the Parties of Their Choice	12

II. New York's Refusal to Permit Petitioners to Affiliate With the Democratic Party Unconstitutionally Abridges Their Right of Free Association	13
III. Section 186 of New York's Election Law Establishes an Unconstitutional Durational Residence Requirement for Voting in a New York Primary Election	13
IV. Section 186 of New York's Election Law Operates as an Unconstitutional "Grandfather Clause" in Violation of the Fourteenth, Fifteenth and Twenty-Sixth Amendments	14

ARGUMENT

Introduction	14
I. New York's Refusal to Permit Petitioners to Vote in a Primary Election Unless They Enrolled in a Political Party at Least 30 Days Prior to the Last Preceding General Election Constitutes an Unlawful Abridgment of the Franchise	17
A. The Right to Vote in a Primary Election Is an Integral Part of the Right to Vote	18
B. State Action Restrictive of the Franchise Must Advance a Compelling State Interest by the Least Drastic Means	19
C. New York's Deferred Enrollment Scheme Does Not Advance a Compelling State Interest by the Least Drastic Means	24

	PAGE
1. New York May Not "Lock" a Voter Into an Unwanted Pre-Existing Political Affiliation	25
2. New York May Not "Lock" Previously Unaffiliated Voters Out of the Parties of Their Choice	31
II. New York's Refusal to Permit Petitioners to Affiliate With the Democratic Party Unconstitutionally Abridges Their Right of Free Association	34
III. Section 186 of New York's Election Law Establishes an Unconstitutional Durational Residence Requirement for Voting in a New York Primary Election	38
IV. New York's Deferred Enrollment Scheme Which Conditions Full Participation in the 1972 Electoral Process Upon Past Participation in the 1971 Electoral Process Is an Unconstitutional "Grandfather Clause" in Violation of the Fourteenth, Fifteenth, and Twenty-sixth Amendments	42
A. "Grandfather Clauses" and the Right to Vote	42
B. The Impact of New York's Statutory Scheme Upon Hitherto Unregistered Members of Racial Minorities	44
C. The Impact of New York's Statutory Scheme on Persons Having Recently Attained Voting Age	45
CONCLUSION	46

TABLE OF AUTHORITIES

	PAGE
<i>Cases:</i>	
Alexander v. Todman, 337 F.2d 962 (3rd Cir.), <i>cert. den.</i> 380 U.S. 915 (1964)	25
Baker v. Carr, 369 U.S. 186 (1962)	17
Bates v. Little Rock, 361 U.S. 516 (1960)	35, 38
Beare v. Smith, 321 F. Supp. 1100 (S.D. Texas, 1971)	25
Boorda v. Subversive Activities Control Board, 421 F.2d 1142 (D.C. Cir., 1969), <i>cert. den.</i> 397 U.S. 1042 (1970)	37
Bullock v. Carter, — U.S. —, 31 L. ed2d 92 (1972)	11, 17, 18
Burke v. Terry, 203 N.Y. 293 (1911)	18
Carrington v. Rash, 380 U.S. 89 (1965)	17, 21, 30
Carter v. Dies, 321 F. Supp. 1358 (N.D. Tex., 1970), <i>aff'd sub nom.</i> Bullock v. Carter, — U.S. —, 31 L. ed.2d 92 (1972)	36, 37
Cipriano v. City of Houma, 395 U.S. 701 (1969)	17, 22
City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970)	17, 23
Cottingham v. Vogt, 60 N.J. Super. 576, 160 A.2d 57 (N.J. Super. 1960)	44
DeGregory v. Attorney General, 383 U.S. 825 (1966)	35, 38
Drueiding v. Devlin, 234 F. Supp. 721 (D. Md. 1964) <i>aff'd per curiam</i> 380 U.S. 125 (1965)	19
Dunn v. Blumstein, — U.S. —, 31 L. Ed.2d 274 (1972)	7, 11, 13, 17, 19, 20, 23, 36, 38, 40, 41
Edwards v. California, 314 U.S. 160 (1941)	38
Evans v. Cornman, 398 U.S. 419 (1970)	17, 22, 36

	PAGE
Ex parte Siebold, 100 U.S. 37 (1879)	17
Ex parte Yarbrough, 110 U.S. 651 (1884)	17
Flast v. Cohen, 392 U.S. 83 (1968)	41
Gangemi v. Rosengard, 44 N.J. 166, 207 A.2d 665 (1965)	44
Gibson v. Florida Legislative Investigations Committee, 372 U.S. 539 (1963)	35, 38
Goetsch v. Philhower, 60 N.J. Super. 582, 160 A.2d 60 (N.J. Super. 1960)	44
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	17
Gordon v. Executive Committee of the Democratic Party of Charleston, 335 F. Supp. 166 (D. S.C., 1971)	12, 26, 31, 33
Gray v. Sanders, 372 U.S. 368 (1963)	17
Guinn v. United States, 238 U.S. 347 (1915)	17, 42, 43, 45
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	17
Jordan v. Meisser, — U.S. —, 40 USLW 3398 (Feb. 22, 1972)	33, 39
Katzenbach v. Morgan, 384 U.S. 641 (1966)	23
Kelly v. New York City Board of Elections, Supreme Court, New York County, 72-11640	10
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	9
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)	17, 21, 36

Lane v. Wilson, 307 U.S. 268 (1939)	17, 42, 43, 45
Lippitt v. Cippollone, — U.S. —, 40 U.S.L.W. 3334 (January 17, 1972)	28, 33
Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961)	35
Louisiana v. United States, 380 U.S. 145 (1965)	23
McGowan v. Maryland, 366 U.S. 420 (1961)	19
Moore v. Ogilvie, 394 U.S. 814 (1969)	11
Nagler v. Stiles, — F. Supp. — (D. N.J., May 24, 1972)	12, 27, 31
NAACP v. Alabama, 357 U.S. 449 (1958)	20-21, 35, 37, 38
Nixon v. Condon, 286 U.S. 73 (1932)	17, 18, 23
Nixon v. Herndon, 273 U.S. 536 (1927)	17, 18, 23
Oregon v. Mitchell, 400 U.S. 112	38
Passenger Cases, 7 How. 283 (1849)	38
Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark., 1968), <i>aff'd per curiam</i> 393 U.S. 14 (1968)	35, 37
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Reynolds v. Sims, 377 U.S. 533 (1964)	17, 20
Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), <i>cert. den.</i> 333 U.S. 875 (1948)	18
Shapiro v. Thompson, 394 U.S. 618 (1969)	20, 38
Shelton v. Tucker, 364 U.S. 479 (1960)	21, 38
Sherbert v. Verner, 374 U.S. 398 (1963)	21
Skinner v. Oklahoma, 316 U.S. 535 (1942)	19, 20

Smith v. Allwright, 321 U.S. 649 (1944)	17, 18
Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y.), <i>aff'd</i> 400 U.S. 806 (1970)	17, 18
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911)	11
Speiser v. Randall, 357 U.S. 513 (1958)	21
Terry v. Adams, 345 U.S. 461 (1953)	11, 15, 17, 18
Thornhill v. Alabama, 310 U.S. 88 (1940)	41
Turner v. Fouche, 396 U.S. 346 (1970)	23
United States v. Classic, 313 U.S. 299 (1941)	17, 18
United States v. Mosley, 238 U.S. 383 (1915)	17
United States v. Robel, 389 U.S. 258 (1967)	35, 37
United States v. Saylor, 322 U.S. 385 (1944)	17
Wesberry v. Sanders, 376 U.S. 1 (1964)	17
Williams v. Rhodes, 393 U.S. 23 (1968)	13, 17, 23, 33, 35, 36, 37
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	20

Constitutional Provisions:

United States Constitution

First Amendment	21, 35, 36, 37
Fourteenth Amendment	14, 19, 42
Fifteenth Amendment	14, 42, 43, 45
Twenty-sixth Amendment	14, 42, 43, 45

Federal Statutes:

28 U.S.C. §1254(1)	2
42 U.S.C. §1973(a)(a)	9, 40
42 U.S.C. §1973(c)(1)	40

State Statutes:

California Election Code §§22, 203, 311-312	32
Illinois Annotated Statutes §§5-30	32
Annotated Laws of Massachusetts, ch. 53, §§37, 38	32
Michigan Compiled Laws Annotated, §§168.570, .575-.576	32
New Jersey Statutes Annotated, 19:23-45	32
New York Election Laws	
§173	5, 6
§174	5, 6, 12, 28, 33
§186	<i>Passim</i>
§187	6, 39
§332	12, 28, 32, 33
§369	5, 6
§385	5, 6
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Other Authorities:

Hamilton, <i>The Federalist</i> #9	14
Hofstadter, <i>The Idea of a Party System</i> (1970)	14, 15
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Purdon's <i>Pennsylvania Statutes Annotated</i> , Title 25, §§291 <i>et seq.</i>	32
Vernon's <i>Annotated Texas Statutes</i> , Title 9, Article 13.01a	32

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN, and KAREN LEE
GOTTESMAN, individually and on behalf of all others
similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New
York, JOHN P. LOMENZO, Secretary of State of The
State of New York, MAURICE J. O'ROURKE, JAMES M.
POWER, THOMAS MALLEE and J. J. DUBERSTEIN, con-
sisting of the BOARD OF ELECTIONS IN THE CITY OF NEW
YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all
others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New
York, JOHN P. LOMENZO, Secretary of State of The
State of New York, WILLIAM D. MEISSNER and MARVIN
D. CHRISTENFELD, Commissioners of Elections for Nas-
sau County,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

The decision of the United States District Court for the Eastern District of New York, Chief Judge Jacob Mishler presiding, declaring Section 186 of New York's Election Law unconstitutional has not yet been officially reported. It is reproduced in the Appendix at 21-47. The Memorandum of Decision and Order of Chief Judge Mishler denying respondents' application for reargument has not yet been officially reported. It is reproduced in the Appendix at 49-56. The decision of the United States Court of Appeals for the Second Circuit reversing the District Court has not yet been officially reported. It is reproduced in the Appendix at 64-73.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on Friday, April 7, 1972. A motion for a rehearing in banc was made on Monday, April 10, 1972 and was denied on April 24, 1972. The petition for certiorari herein was docketed on April 24, 1972. Certiorari was granted on May 30, 1972. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Is Section 186 of New York's Election Law unconstitutional insofar as it prohibits persons enrolling in a political party from participating in a primary election unless their enrollments were completed 30 days prior to the last preceding general election?

2. Do less drastic alternatives exist to the disenfranchisement of voters situated similarly to petitioners?

3. Does Section 186, by deferring the effective date of petitioners' affiliation with the Democratic Party for at least eleven months, impose an unconstitutional restraint upon petitioners' freedom of association?

4. Does Section 186 impose an unconstitutional durational residence requirement for voting in a New York primary election?

5. Does Section 186 constitute an unconstitutional "grandfather clause" conditioning full participation in the current electoral process upon some degree of participation in a preceding election?

Statutory Provisions Involved

NEW YORK STATE ELECTION LAW, §186

§186. *Opening of enrollment box and completion of enrollment*

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register con-

taining enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year. L.1949, c. 100; amended L.1955, c.41, eff. March 7, 1955.

The Operation of New York's Statutory Scheme Regulating Affiliation With a Political Party

Registered voters in New York State desiring to associate with one of the four political parties currently recognized under New York law must cope with a cumbersome and archaic party enrollment process dating from the 19th century. Each prospective enrollee must complete an enrollment blank containing the following declaration:

"I, _____, do solemnly declare that I am a qualified voter of the election district in which I have been registered and that my resident address is _____; that I am in general sympathy with the principles of the party which I have designated by my mark hereunder; and that it is my intention to support generally at the next general election, state or national, the nominees of such party for state or national offices." Election Law, §174. See also §§369; 385-389.

Once the enrollment blank has been completed, it must be deposited in an enrollment box in such a manner as to conceal the identity of the party involved. *Election Law* §173. The enrollment box into which the enrollment blank is deposited must remain locked until the Tuesday following the next general election. *Election Law* §186.¹ No action finalizing an enrollment can occur while the enrollment blank is locked in the enrollment box. Once the enrollment boxes have enjoyed their annual mid-November airing, the respective party affiliations set forth on the enrollment blanks are entered on the official election registers "before the succeeding first day of February." *Election Law* §186. Until the boxes have been opened and the party affiliation formally entered on the register books, the voter involved is not deemed to be enrolled in the party of his or her choice. *Election Law* §186.

Applying New York's statutory scheme to petitioners' attempt to associate with the Democratic Party, the following events must occur before they will be recognized by New York State as affiliated with the political party of their choice.

¹ In 1972, the date for the annual opening of the enrollment boxes falls on November 14, 1972.

- 1) They must duly register to vote.
- 2) They must complete an enrollment blank at which they "solemnly declare" their general sympathy with the party with which each wishes to associate. *Election Law* §§174; 369; 385-389.
- 3) They must deposit the completed enrollment blank in a locked enrollment box. *Election Law* §173.
- 4) The completed enrollment blank must remain locked in the enrollment box until November 14, 1972. *Election Law* §186.
- 5) Sometime between November 14, 1972 and February 1, 1973, petitioners' names must be entered on the official register books as enrolled Democrats. *Election Law* §186.
- 6) Until the register book entry is made, petitioners may not vote in a primary election or participate, in any way, in the affairs of the Democratic Party. *Election Law* §186.³

Thus, despite the fact that each petitioner formally expressed his or her intention to associate with the Democratic Party in early December 1971, and "solemnly declared" his or her general sympathy with the principles of the Democratic Party, they will not be permitted to associate with the Democratic Party until a date somewhere between November 14, 1972 and February 1, 1973,

³ Thus, the period which must elapse under New York law between petitioners' initial attempt to join the Democratic Party and their official acceptance as party members is 11-14 months.

Section 187 of the Election Law permits a limited number of voters to enroll immediately in the party of their choice without waiting for the annual opening of the enrollment boxes. The chief exceptions contained in Section 187 are for persons who were too young or too ill to have registered previously.

and, therefore, were barred from voting in the June 1972 Presidential Primary.

New York's deferred enrollment procedure also disenfranchises persons seeking to re-register after having established a new residence in New York.

Thus, an established member of a political party who moves from Brooklyn to Nassau County may not participate in the affairs of his party or vote in a primary until his new enrollment blank has been taken from the locked enrollment boxes and re-entered on the voting registers pursuant to Section 186.

In addition, an established member of a political party who moves from a sister state into New York State may not participate in the affairs of his party until his new enrollment blank has been removed from the locked enrollment box and processed pursuant to Section 186.

Accordingly, no person who established a residence in New York State subsequent to October 2, 1971³ was eligible to vote in the June 1972 Presidential primary. Cf., *Dunn v. Blumstein*, — U.S. —, 31 L. Ed.2d 274 (1972).

The issue posed by this case is whether New York may impose such a drastic curb on the right to vote, the right to travel and the right to associate for the advancement of political beliefs.

³ October 2, 1971 was the last date on which enrollment blanks could have been completed in time for the annual November 1971 enrollment box opening. Enrollment blanks received after October 2, 1971, will not see the light of day until November 14, 1972.

Statement of the Case

Petitioners are duly qualified voters who were barred from voting in New York's June 20, 1972, Presidential primary because they failed to enroll in the Democratic Party on or before October 2, 1971.

Petitioners registered to vote for the first time in New York State early in December 1971 and immediately sought to enroll in the political party of their choice.⁴ Each petitioner duly completed an enrollment blank designating his or her respective affiliation with the Democratic Party and affirming his or her intention to support the candidates of the Democratic Party at the next general election (A 3, 4, 9). The completed enrollment blanks were, thereupon, deposited in a locked enrollment box maintained for that purpose. Each petitioner was informed that his or her

⁴ Petitioner, Pedro J. Rosario, is 18 years old. He registered to vote for the first time on December 3, 1971 in Kings County, New York, and completed an enrollment blank designating his affiliation with the Democratic Party. He was not permitted to vote in the Democratic Primary held in New York on June 20, 1972 (A 3).

Petitioner, William J. Freedman, is 21 years old. He registered to vote for the first time on December 3, 1971, in Queens County, New York, and completed an enrollment blank designating his affiliation with the Democratic Party. He was not permitted to vote in the Democratic Primary held in New York on June 20, 1972 (A 3).

Petitioner, Karen Lee Gottesman, is 21 years old. She registered to vote for the first time on December 3, 1971, in Queens County, New York, and completed an enrollment blank designating her affiliation with the Democratic Party. She was not permitted to vote in the Democratic Primary held in New York on June 20, 1972 (A 4).

Petitioner, Steven Eisner, is 22 years old. He registered to vote for the first time on December 13, 1971, in Nassau County, New York, and completed an enrollment blank designating his affiliation with the Democratic Party. He was not permitted to vote in the Democratic Primary held in New York on June 20, 1972 (A 7-9).

attempted enrollment in the Democratic Party would be deferred, pursuant to Section 186 of New York's Election Law, until the next physical opening of the locked enrollment boxes, scheduled for November 14, 1972 (A 5, 9). Since petitioners' enrollment in the Democratic Party could not become effective until the physical opening of the enrollment boxes on November 14, 1972, petitioners were declared ineligible to participate in the June 20, 1972 New York State Presidential Primary (A 5, 9).⁵

Petitioners' initial challenge to the constitutionality of Section 186 met with success. On February 10, 1972, Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York declared that Section 186 unconstitutionally abridged petitioners' rights to participate in the electoral process and petitioners' freedom to associate with the political party of their choice.⁶ In addition, Chief Judge Mishler found that Section 186 imposed a durational residence requirement for voting in a Presidential Primary in violation of Title 42 U.S.C. §1973(a)(a). (Chief Judge Mishler's opinion is reproduced in the Appendix at pp. 21-47.)

⁵ In order to have voted in the June 20, 1972 primary, petitioners would have to have completed their enrollment blanks on or before October 2, 1971—in time to have qualified for the November 1971 opening of the locked enrollment boxes. None of the petitioners registered to vote in the November 1971 general elections, at which the highest office at stake was County Executive.

⁶ Petitioners initially sought the convocation of a statutory three judge Court. However, petitioners withdrew their request for injunctive relief and Chief Judge Mishler accepted jurisdiction as a single District Judge. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Chief Judge Mishler's Memorandum of Decision describing the facts and circumstances surrounding petitioners' withdrawal of their request for injunctive relief is reproduced in the Appendix at pp. 49-56.

Respondents secured a stay of Chief Judge Mishler's declaratory judgment on February 22, 1972 and were granted an expedited appeal by the Second Circuit, which was argued on February 24, 1972 (A 63).

On April 7, 1972, a panel of the Second Circuit consisting of Judges Lumbard, Mansfield and Mulligan, reversed Chief Judge Mishler and ruled that Section 186 constituted a valid attempt to shield political parties from bad faith "raiding" by persons who were not truly in accord with the principles of the party in question. (The Second Circuit's opinion is reproduced in the Appendix at pp. 64-73.)

Petitioners' application for a rehearing in banc was denied on April 24, 1972, with Judges Oakes and Feinberg dissenting (A 78).

On April 26, 1972, Mr. Justice Marshall granted a temporary stay of the Second Circuit's judgment pending consideration by the full Court. On May 30, 1972, the full Court granted the petition for a writ of certiorari herein, but by a 5-4 vote declined to stay the decision of the Second Circuit pending plenary consideration on the merits (A 80).¹

¹ A final appeal to the New York State courts, in which voters similarly situated to the petitioners herein sought relief under the New York State Constitution, was dismissed without prejudice on June 14, 1972, in Supreme Court, New York County, despite the pleas of the Corporation Counsel of the City of New York and the New York State Democratic Party that persons situated similarly to petitioners herein be permitted to vote. *Kelly v. New York City Board of Elections*, Supreme Court, New York County, 72-11640.

Although the June primaries have been completed and petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot. Since the problem to New York voters posed by Section 186 of New York's Election Law is "capable of repetition; yet evading review," this Court retains appellate jurisdiction

SUMMARY OF ARGUMENT

I.

New York's Refusal to Permit Petitioners to Vote in a Primary Election Unless They Enrolled in a Political Party at Least 30 Days Prior to the Last Preceding General Election Constitutes an Unlawful Abridgment of the Franchise.

A. *The Right to Vote in a Primary Election Is an Integral Part of the Right to Vote.*

It is no longer open to serious question that the right to vote in a primary election is as protected against state encroachment as is the right to vote in a general election. E.g., *Bullock v. Carter*, — U.S. —, 31 L. Ed.2d 92 (1972); *Terry v. Adams*, 345 U.S. 461 (1953). Therefore, New York's refusal to permit voters to participate in a primary election must be measured by the same constitutional standard which would test its refusal to permit them to vote in a general election.

B. *State Action Restrictive of the Franchise Must Advance a Compelling State Interest by the Least Drastic Means.*

This Court has ruled that state statutes which selectively distribute the franchise must advance a compelling state interest by the least drastic means in order to pass judicial scrutiny under the Equal Protection Clause. E.g., *Dunn v. Blumstein*, — U.S. —, 31 L. Ed.2d 274 (1972).

to rule on the constitutionality of Section 186. E.g., *Dunn v. Blumstein*, — U.S. —, 31 L. Ed.2d 274, 279 n. 2; *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911).

C. *New York's Deferred Enrollment Scheme Does Not Advance a Compelling State Interest by the Least Drastic Means.*

New York claims that Section 186 is necessary to guard against bad faith raiding. However, by establishing a virtually absolute ban on party affiliation during the eight months preceding a Presidential primary, New York has chosen the most drastic means to guard against raiding.

1. New York May Not "Lock" a Voter Into an Unwanted Pre-Existing Political Affiliation.

The lower federal courts have unanimously rejected attempts to lock voters into pre-existing political affiliations. *Gordon v. Executive Committee of the Democratic Party of Charleston*, 335 F. Supp. 166 (D. S.C., 1971); *Pontikes v. Kusper*, — F. Supp. — (N.D. Ill., March 9, 1972); *Nagler v. Stiles*, — F. Supp. — (D. N.J., May 24, 1972). The less drastic alternatives of loyalty oaths (Section 174) and summary disenrollment (Section 332) render the blanket prohibition upon party enrollment contained in Section 186 unnecessary, and, therefore, unconstitutional.

2. New York May Not "Lock" Previously Unaffiliated Voters Out of the Parties of Their Choice.

Even if New York may constitutionally regulate the alteration of pre-existing party affiliations, it possesses no legitimate interest whatever in impeding newly registered previously unaffiliated voters from effecting their initial party affiliation. Whatever the views of the various states on regulating the alteration of pre-existing party affiliation, no state, with the exception of New York, has deemed it necessary to impose crippling restrictions upon new voters making an initial party affiliation.

II.

New York's Refusal to Permit Petitioners to Affiliate With the Democratic Party Unconstitutionally Abridges Their Right of Free Association.

New York's statutory scheme imposes a waiting period of eleven to fourteen months between petitioners' initial attempt to join the Democratic Party in December, 1971 and their final acceptance as party members sometime between November 14, 1972 and February 1, 1973. Such a waiting period unduly impinges upon petitioners' constitutional right to associate with the political party of their choice. *Williams v. Rhodes*, 393 U.S. 23 (1968). Certainly, New York cannot contend that it possesses an overriding societal interest in protecting political parties against previously unaffiliated new voters who seek merely to declare their initial party affiliations.

III.

Section 186 of New York's Election Law Establishes an Unconstitutional Durational Residence Requirement for Voting in a New York Primary Election.

Section 186 singles out all persons who have established a residence in New York subsequent to New York's last preceding general election and prohibits them from voting in a primary election in direct violation of *Dunn v. Blumstein*, — U.S. —, 31 L. Ed.2d 274 (1972).

IV.

Section 186 of New York's Election Law Operates as an Unconstitutional "Grandfather Clause" in Violation of the Fourteenth, Fifteenth and Twenty-Sixth Amendments.

In order to participate in the June 1972 Presidential Primary, New York's statutory scheme required petitioners to have been registered to vote in the November 1971 local elections. In effect, therefore, New York has established a "grandfather clause" which conditions full participation in the 1972 Presidential election upon past participation in 1971 local elections. Since such "grandfather clauses" inevitably fall with disproportionate force upon hitherto unregistered members of racial or ethnic minorities and persons having recently attained voting age, they violate the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.

ARGUMENT

Introduction

The draftsmen of the Constitution did not foresee the development of political parties in the United States. Indeed, they viewed the rise of political parties as an evil, tending to foment strife and discord in the body politic. Hofstadter, *The Idea of a Party System* (1970); see generally, *The Federalist* #9 (Hamilton); *The Federalist* #10 (Madison).

However, contrary to the experience of many European democracies and the fears of the Founding Fathers, the

formation of political parties in the United States has not exerted a fragmenting effect upon our political life. Pluralism within parties, rather than pluralism among parties, has been a hallmark of American politics. Thus, political parties in the American tradition have not been viewed as ideological refuges for "true believers", but rather as groupings of diverse interests joined together in a coalition for the purpose of achieving shared political goals. Only under such a pragmatic view of the nature and function of a political party could men of such diverse ideologies as George Wallace and Allard Lowenstein and Pete McClosky and John Ashbrook share the same party affiliation.

Given such a non-ideological tradition in party politics, it is not surprising that inter-party mobility has been a fact of American political life. Peterson, *The Day of the Mugwump* (1961); Lipset, *Political Man: The Social Bases of Politics* (1960). The limits of permissible state interference with such inter-party mobility is what much of this case is about.

A second unforeseen impact of the political party system has been its dominance of the nominating process. In most elections, participation in the political party nominating process is a *sine qua non* to meaningful participation in the electoral process. Cf. *Terry v. Adams*, 345 U.S. 461 (1953). As the impetus for increased popular participation in the nominating process has grown, the traditional party caucus has been replaced by popularly elected nominating conventions and by the increasing use of direct primaries. Merriam and Overacker, *Primary Elections* (1928). Since many states, including New York, require that participants in the party nominating process be members of the political party

in question, the requirements of party membership exert a direct impact upon the ability of voters to participate in primary elections. The limits of permissible state interference with such participation in the nominating process poses the second major issue herein.

It should be noted that since the petitioners herein are all previously unaffiliated voters seeking to register and enroll in a political party for the first time, this Court need not reach the arguably more difficult issue of voters seeking to alter an established party affiliation in order to associate with a newly chosen political party. No issue of party "switching" or "cross-over voting" is present in this case.

Thus, the narrow issue posed herein is the permissible scope of state imposed restrictions upon duly qualified, previously unaffiliated voters seeking to enroll in a political party for the first time in order to participate in a Presidential primary. Given the non-ideological nature of our political party system and the critical importance of participating in the nominating process, New York's restrictions go far beyond the sphere of legitimate state regulation of the electoral process.

L

New York's Refusal to Permit Petitioners to Vote in a Primary Election Unless They Enrolled in a Political Party at Least 30 Days Prior to the Last Preceding General Election Constitutes an Unlawful Abridgment of the Franchise.

This Court's interest in protecting the right of franchise against state abridgment is neither new, nor terribly surprising, given the core position which the franchise occupies in our democratic form of government. E.g., *Ex parte Siebold*, 100 U.S. 37 (1879); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Guinn v. United States*, 238 U.S. 347 (1915); *United States v. Mosley*, 238 U.S. 383 (1915); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Lane v. Wilson*, 307 U.S. 268 (1939); *United States v. Classic*, 313 U.S. 299 (1941); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Saylor*, 322 U.S. 385 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Carrington v. Rash*, 380 U.S. 89 (1965); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Evans v. Cornman*, 398 U.S. 419 (1970); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y.), *aff'd* 400 U.S. 806 (1970); *Bullock v. Carter*, — U.S. —, 31 L. Ed.2d 92 (1972); *Dunn v. Blumstein*, — U.S. —, 31 L. Ed.2d 274 (1972).

A. The Right to Vote in a Primary Election Is an Integral Part of the Right to Vote.

It is no longer open to serious question that the right to vote in a primary election is as protected against state encroachment as is the right to vote in the general election. E.g., *Bullock v. Carter*, — U.S. —, 31 L. Ed.2d 92 (1972); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *United States v. Classic*, 313 U.S. 299 (1941); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), cert. den. 333 U.S. 875 (1948). Our courts have consistently recognized that the right to vote may be rendered meaningless in the absence of a correlative right to participate in the nominating process by which candidates are selected. E.g., *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y.), aff'd 400 U.S. 806 (1970).

Thus, as long ago as 1944, in *Smith v. Allwright*, *supra*, this Court held:

"It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." 321 U.S. at 661-662.

Therefore, New York's refusal to permit petitioners to participate in a primary election must be measured by the same constitutional standards which would test its refusal to permit them to vote in the November general elections. *Burke v. Terry*, 203 N.Y. 293 (1911) at 295; *Bullock v. Carter*, *supra*.

B. State Action Restrictive of the Franchise Must Advance a Compelling State Interest by the Least Drastic Means.

This Court has imposed a rigorous "Equal Protection" standard in testing the constitutionality of state statutes which restrict the franchise. In order to justify denying the vote to some of its citizens while permitting the remainder to vote, a state must demonstrate that the statute involved advances a compelling state interest by the least drastic means. E.g., *Dunn v. Blumstein*, — U.S. —, 31 L. Ed.2d 274 (1972).

Traditionally, state statutes challenged as violative of the Equal Protection Clause of the Fourteenth Amendment were sustained if they were rationally related to the advancement of a legitimate state interest. E.g., *McGowan v. Maryland*, 366 U.S. 420 (1961). Indeed, this standard was once applied by this Court to measure the constitutionality of state durational residence requirements for voting. *Drueding v. Devlin*, 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam 380 U.S. 125 (1965). However, two major exceptions to the permissive "rational relationship" test have emerged in recent years. See, generally, Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969). If a statute purports to erect suspect classifications based upon such discredited criteria as race; or, if a statute is restrictive of the exercise of a "fundamental" right, this Court has employed a far more rigorous standard of review in determining its constitutionality. To pass scrutiny under the Equal Protection clause, such a statute must not merely be rationally related to the advancement of a legitimate state interest, but must also be found necessary to advance a compelling state interest by the least drastic means possible. E.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

The right to vote is the assumption upon which the entire fabric of our political system is premised. Without the right to vote, freedom of speech and assembly would be relegated to meaningless anachronisms. It is not surprising, therefore, that this Court has explicitly recognized the right to vote as one of the "fundamental" rights, entitled to plenary protection against state encroachment.^{*} Thus, Chief Justice Warren, writing for this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964) stated:

"Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights. 118 U.S. at 370.' *Id.* at 561-62.

Having characterized the free exercise of the franchise as a fundamental right, this Court has applied the compelling state interest test to a number of state statutes restrictive of the franchise.^{*}

^{*} This Court has identified at least the following as "fundamental" interests: (1) "procreation" *Skinner v. Oklahoma*, 316 U.S. 535 (1942); (2) "voting" e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); and (3) "travel" *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, *supra*.

^{*} Practically speaking, there seems little difference between a compelling state interest analysis under the Equal Protection clause and the recognition of a substantive right to vote subject to the traditional "balancing" test. Cf. *NAACP v. Alabama*, 357 U.S.

In *Carrington v. Rash*, 380 U.S. 89 (1965), Mr. Justice Stewart, writing for this Court, invalidated a provision of the Texas Constitution which disabled servicemen from voting in Texas. Mr. Justice Stewart, in words appropriate to the instant case, stated:

"We deal here with matters close to the core of our constitutional system. 'The right . . . to choose,' *United States v. Classic*, 313 U.S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state." 380 U.S. at 96.

In *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), this Court invalidated a New York law which limited the franchise in School Board elections to property owners and parents. Chief Justice Warren, writing for the *Kramer* Court, stated:

"Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." 395 U.S. at 626-627.

449 (1958). Thus, the compelling state interest test applied to statutes restrictive of fundamental rights is similar to the analysis utilized by this Court in a First Amendment context to invalidate overbroad state statutes. E.g., *Shelton v. Tucker*, 364 U.S. 479 (1960); *Speiser v. Randall*, 357 U.S. 513 (1958); *Sherbert v. Verner*, 374 U.S. 398 (1963).

In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), this Court invalidated a Louisiana law restricting the franchise in municipal bond elections to property owners. In a per curiam opinion, the Court stated:

"The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the State's sole justification for the statute is that the classification provides a 'rational basis' for limiting the franchise to those voters with a 'special interest,' the statute clearly does not meet the 'exacting standard of precision we require of statutes which selectively distribute the franchise.'" *Id.* at 706.

In *Evans v. Cornman*, 398 U.S. 419 (1970), this Court unanimously invalidated Maryland's refusal to permit residents at the National Institute of Health to vote in Maryland elections. Mr. Justice Marshall, writing for the Court, stated:

"... 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment' [citations omitted]. Moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges [citations omitted]. And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." 398 U.S. at 422.

In *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), this Court, applying a compelling state interest test, invalidated Arizona's attempt to restrict the franchise in general obligation bond elections to property owners. See also, *Turner v. Fouche*, 396 U.S. 346 (1970); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Louisiana v. United States*, 380 U.S. 145 (1965); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Williams v. Rhodes*, 393 U.S. 23 (1968).

The spate of Supreme Court decisions applying a compelling state interest test to state statutes restrictive of the franchise culminated in *Dunn v. Blumstein*, — U.S. —, 31 L. Ed.2d 274 (1972), in which this Court invalidated Tennessee's one year and 90 day durational residence requirements. Mr. Justice Marshall, writing for the Court in *Dunn v. Blumstein*, *supra*, stated:

"It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP v. Button*, 371 U.S. 415, 438 (1963); *United States v. Robel*, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro v. Thompson*, *supra*, 394 U.S. at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden of constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" 31 L. Ed.2d at 285.

Thus, in order to pass constitutional scrutiny, New York must demonstrate that its disenfranchisement of petitioners is *necessary* to promote a *compelling* governmental interest.

C. *New York's Deferred Enrollment Scheme Does Not Advance a Compelling State Interest by the Least Drastic Means.*

The Court below accepted New York's contention that Section 186 is "necessary" to guard against bad faith "raiding" of a political party by enrollees who do not share the principles of the party (A. 64-73).

It is highly doubtful whether the Court below applied the appropriate standard of judicial review to Section 186. Instead of finding that Section 186 advanced a compelling state interest by the least drastic means, the Court below was content merely to recite that Section 186 appeared "calculated to impinge minimally on First and Fourteenth Amendment rights" (A. 69 n. 4). Such a finding is scant solace to the tens of thousands of young voters who were barred from the 1972 June primary pursuant to Section 186. Nor is such a finding supported by an analysis of the statute. Far from acting in a "manner calculated to impinge minimally on First and Fourteenth Amendment rights," Section 186 is unnecessarily broad and imposes maximum, rather than minimum disenfranchisement.

By creating an absolute ban on party affiliation during the eight months preceding a Presidential primary, New York has chosen the most drastic means to guard against raiding. The Court below made no attempt to canvass the numerous less drastic alternatives open to New York and never even discussed the fact that Section 186 makes no

distinction between newly¹⁰ registered voters declaring their initial party affiliation and established members of one political party attempting to "cross over" into a new political party.

1. New York May Not "Lock" a Voter Into an Unwanted Pre-Existing Political Affiliation.

Even if one concedes that the prevention of bad-faith raiding is a compelling state interest,¹⁰ it does not follow that the virtually absolute ban on party affiliation imposed by Section 186 during the eight months preceding a Presidential Primary or the eleven months preceding a non-Presidential Primary is the least drastic means of promoting such an interest.¹¹ Such an absolute ban upon party affiliation, imposed before prospective voters have knowledge of the issues or candidates which will be the subject of the primary election in question, far exceeds a state's power to regulate the electoral process. Cf. *Beare v. Smith*, 321 F. Supp. 1100 (S.D. Texas, 1971) at 1107.

In a series of cases, the lower Federal courts have invalidated similar restrictions, which act to lock voters into pre-existing party affiliations, as violative of the right to vote.

¹⁰ It should be noted that those in control of a political party often perceive any threat to their continued exercise of power as unjustified and, hence, a species of "raiding." One man's raiding may often constitute another man's reform. See generally, *Alexander v. Todman*, 337 F.2d 962 (3rd Cir.), cert. den. 380 U.S. 915 (1964).

¹¹ The eight-month *cordon sanitaire* erected by New York to guard the purity of its June Presidential primary ran from October 2, 1971, the last day on which petitioners' enrollment could have been effective, to June 20, 1972, the date of the primary. In non-Presidential years, the quarantine period runs from early October to the following September.

In *Gordon v. Executive Committee of the Democratic Party of Charleston*, 335 F. Supp. 166 (D. S.C., 1971), a unanimous three-judge court invalidated a South Carolina statute which barred an otherwise qualified voter from participating in a party primary if he had voted in the primary of another party within the past year. The Court stated:

"No sound or compelling purpose can possibly justify 'locking' a citizen into a party and denying to him for a full year freedom to change parties. Such an arbitrary restraint upon the voter is both unreasonable and unconstitutional. Our system of government is based on the consent of the governed, and such consent is only illusory when voters are prevented by artificial restrictions for significant periods of time from changing political parties even though events or the actions of elected representatives may have convinced the voter that a change in party allegiance is warranted." 335 F. Supp. at 169.

The operation of Section 186 unconstitutionally "locks" New Yorkers into the political parties to which they belonged as of the last preceding general election and, for a period of one year, disables qualified voters from changing party allegiance to reflect changes in the political climate.

In *Pontikes v. Kusper*, — F. Supp. — (N.D. Ill., March 9, 1972), a three-judge District Court invalidated an Illinois statute which prohibited a voter from participating in a party primary if he had voted in the primary of another party within the past 23 months. The Court stated in *Pontikes*:

"[T]he statute sweeps too broadly, impeding both deceptive conduct and constitutionally protected activities. If Section 7-43(d) were not in effect, massive party switching could occur either because of the well-planned raiding of one party, or because of the massive dissatisfaction with the prevailing policies of any existing party. The state's interest upon which this statute is grounded could be characterized as 'compelling' only if the former alternative is more likely to occur than the latter, or if raiding constitutes a more important danger to constitutionally protected rights however often it occurs. There is no evidence to indicate that raiding is more likely to take place than 'honest' switches of affiliation. Forty-four states do not impose post election restraints on changing affiliation. This would indicate that raiding is not a serious threat to the multi-party system."

The *Pontikes* court recognized that to disenfranchise thousands of concededly *bona fide* voters in order to avoid the possibility of large-scale raiding was to exchange a certain evil for a potential evil which might well never occur.

Finally, in *Nagler v. Stiles*, — F. Supp. — (D. N.J., May 26, 1972), a three-judge District Court invalidated a New Jersey statute which prohibited alterations in party affiliations for a 23 month period. The Court in *Nagler* accepted the state's contention that it possessed a compelling state interest in guarding against bad faith raiding, but ruled that New Jersey was obliged to promote its interest by a less drastic means.

Thus, apart from the panel of the Second Circuit below, no court has sustained state restrictions on party affiliation

which act to prohibit an otherwise *bona fide* voter from effecting a good faith alteration of his party affiliation.¹²

Petitioners do not contend, however, that New York is powerless to enact "precise," narrowly drawn, regulations governing party affiliation. Indeed, New York has provided a series of less drastic regulatory measures to guard against "raiding" which render the absolute ban on party affiliation imposed by Section 186 unnecessary and, therefore, unconstitutional.

First, New York requires that all enrollees in a political party execute an oath that they are in general sympathy with the principles of the party in question. Election Law §174. Such a requirement prevents casual party affiliation in New York and it is an affront to the integrity of the electorate to assume, as did the Court below, that large numbers of New Yorkers are likely to falsify the required "solemn declaration" in order to cast a primary ballot in bad faith. Coupled with New York's comprehensive criminal sanctions directed at election fraud, Section 174 provides a meaningful protection of the integrity of party membership.

Second, Section 332 of the Election Law provides for a summary disenrollment process permitting a political party to purge itself of unwanted "raiders." As Chief Judge Mishler noted below:

¹² In *Lippitt v. Cippollone*, — U.S. —, 40 U.S.L.W. 3334 (January 17, 1972), this Court summarily affirmed by a 5-4 vote the constitutionality of an Ohio statute which prohibited a person from running for office in a party primary if he voted in the primary of another party within the past four years. The state's interest in regulating candidacy, as opposed to voting, renders *Lippitt* inapplicable.

It is true that such raiding is possible. See *Matter of Zuckman v. Donohue*, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct.), aff'd 274 A.D. 216, 80 N.Y.S.2d 698 (3rd Dept.) aff'd without opinion 298 N.Y. 627, 81 N.E.2d 371, 86 N.Y.S.2d — (1948); *Matter of Werbel v. Gernstein*, 191 Misc. 275, 78 N.Y.S.2d 440 (Sup. Ct. 1948); *Matter of Newkirk*, 144 Misc. 765, 259 N.Y.S. 434 (Sup. Ct. 1931).¹³ [Footnote renumbered.]

However, where a law is subject to the compelling state interest test it "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290 (1964). Assuming, *arguendo*, that the protection of party integrity is a "permissible state policy," no showing has been made that the enrollment box system is necessary to its accomplishment.

The state has other, less drastic, means to accomplish its ends if it wishes to protect minority parties and small geographic subdivisions of major parties. Section 332 of the New York Election Law provides that the party enrollment of a voter may be challenged by any fellow party member and cancelled by a Justice of the State Supreme Court upon the determination of the Chairman of the County Committee of the

¹³ Each of these cases involved the attempted takeover of a party organization by adherents of another party. In each case, they were almost successful. Nevertheless, it is to be noted that the enrollment box system was in effect throughout the period during which these cases arose, and that that system in no way prevented hundreds of determined voters from organizing prior to the last general election and changing their party enrollments so as to be able to "raid" the other party. All of these cases arose when the enrollments of the raiders were challenged by bona fide party members.

party in the county in which the challenged voter is enrolled that the voter is not in sympathy with the principles of the party.

That such procedure is highly effective, even on extremely short notice before a primary, is attested to by the results in the three state court cases cited above, *Zuckman*, *Werbel*, and *Newkirk*. Each of those cases involved challenges to the enrollment of party members. Each case involved an attempted takeover of one party by members of another. Challenges in each of the three cases were successful.

Such a proceeding, then, is sufficient to protect the permissible interests of the state. The challenge procedure may involve the expenditure of more time and effort on the part of state officials, but New York may not "deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington v. Rash*, *supra*, 380 U.S. at 96, 85 S.Ct. at 780 (A 36-37).¹⁴

Moreover, at least two additional less drastic means exist which would permit New York to promote its legitimate interests without unduly infringing upon the right to vote.

First, New York could confine the strictures of Section 186 to the only class of voters which, even arguably, poses a danger of organized, large scale, raiding—persons seeking to alter a pre-existing party enrollment.

¹⁴ It should be noted that Chief Judge Mishler is far from unaware of the realities of political life in New York. For many years prior to his elevation to the bench in 1961, he was a leader of the Queens County Republican Party and was its nominee for public office on several occasions.

Second, New York could confine the stricture of Section 186 to those persons whose enrollment has been challenged as suspect by the political party involved.

The utilization by New York of any or all of the "less drastic alternatives" suggested above would permit thousands of concededly *bona fide* voters to participate in the nominating process without posing any real danger of bad faith "raiding."

2. New York May Not "Lock" Previously Unaffiliated Voters Out of the Parties of Their Choice.

Even if New York may constitutionally regulate the alteration of pre-existing party affiliations, it possesses no legitimate interest whatever in placing obstacles in the path of newly registered voters, such as the petitioners herein, seeking to affiliate with a political party for the first time.

No distinction is made under Section 186 among: (a) "new voters," such as the petitioners herein, who are registering for the first time and declaring their initial party affiliation; (b) established voters, recently arrived in New York State, who are registering for the first time in New York State and who are merely continuing a pre-existing affiliation with a political party; and (c) established voters, such as the plaintiffs in *Gordon, Pontikes and Nagler*, who are seeking to alter a pre-existing party affiliation. All are subject to the one year quarantine on party affiliation imposed by Section 186. All are prohibited from participating in a party primary unless they declared their party affiliations 30 days prior to the last preceding general election.

It is difficult to perceive the legitimate—much less compelling—state interest served by a statute which prohibits

newly registered, previously unaffiliated voters from freely associating with the political party of their choice. Surely, previously unaffiliated young voters, registering for the first time, do not pose any meaningful danger of organized bad faith "raiding."¹⁸ Indeed, no other state has imposed restrictions upon previously unaffiliated voters seeking to join a political party for the first time which even approach New York's in severity.

For example, Massachusetts, Illinois, New Jersey and Texas all permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice.¹⁹

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. *California Election Code*, §§22, 203, 311-312 (Registration closes in California 53 days before a primary.); Purdon's *Pennsylvania Statutes Annotated*, Title 25, §§291 *et seq.*

¹⁸ Each instance of alleged attempted party raiding in New York cited by the Attorney General has involved attempts by the enrollees of one party to alter their pre-existing enrollments in order to join a new party. The instances of raiding described by the Attorney General arose out of the division of the New York American Labor Party into two wings, one of which seceded and formed the Liberal Party. The bitter struggle between the two groups for the allegiance of the constituency of the American Labor Party was the backdrop against which the alleged raiding occurred. Even in the midst of such a bitter struggle, as Chief Judge Miahler noted, Section 332 proved an effective antidote to raiding.

Counsel has been able to discover no reported instance of alleged "raiding" on the part of newly registered, previously unaffiliated, voters.

¹⁹ See *Annotated Laws of Massachusetts*, ch. 53, §§37, 38; *Illinois Annotated Statutes* §§5-30; 7-43-45; *New Jersey Statutes Annotated*, 19:23-45; *Vernon's Annotated Texas Statutes*, Title 9, Article 13.01a.

(Registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. *Michigan Compiled Laws Annotated*, §§168.570, .575-.576. Even Ohio, renowned for the severity of its election laws,¹⁷ permits previously unaffiliated voters to declare an initial party affiliation immediately before a primary. *Ohio Revised Code*, §3513.19.

Thus, whatever the views of the various states on permitting established members of one party to switch their affiliation from one party to another (Compare, *Pontikes v. Kusper*, — F. Supp. — (N.D. Ill., March 9, 1972) and *Gordon v. Executive Committee of Democratic Party*, 335 F. Supp. 166 (D. S.Car., 1971) with *Lippitt v. Cippollone*, *supra*), no state, with the exception of New York, has deemed it necessary to impose crippling restrictions upon newly registered voters making an initial declaration of party affiliation.¹⁸

Moreover, if the justification of Section 186 is the prevention of bad faith raiding, why does New York persist in applying the strictures of Section 186 to newly arrived residents of New York who are merely seeking to continue a pre-existing affiliation with the identical political party. Cf. *Jordan v. Meisser*, — U.S. — (1972). The existence of so irrational an application of Section 186 suggests that

¹⁷ See, e.g., *Williams v. Rhodes*, 393 U.S. 23 (1968); *Lippitt v. Cippollone*, — U.S. —, 40 USLW 3334 (January 17, 1972).

¹⁸ It should, of course, be noted that a new voter's affiliation with a political party in New York, whenever it occurs, must be preceded by his signing a loyalty oath (*Election Law*, §174) and may be policed by a summary expulsion procedure (*Election Law*, §332). It is inconceivable that any legitimate need for additional protection exists.

its role as an anti-raiding statute may be little more than an ingenious *post hoc* rationalization advanced by the state to shore up an anachronistic remnant of New York's past which has long since ceased to serve any rational state interest."

Thus, Section 186, by arbitrarily "locking" New Yorkers into a given party affiliation for at least one year and by unnecessarily "locking" previously unaffiliated voters out of the parties of their choice for extended periods of time ranging up to fourteen months, unconstitutionally deprives New Yorkers of their right to full participation in the electoral process. By failing to "tailor" Section 186 to guard "precisely" against bad faith raiding, New York has failed to utilize the least drastic means to promote its interests. Accordingly, Section 186 should not be permitted to stand.

II.

New York's Refusal to Permit Petitioners to Affiliate With the Democratic Party Unconstitutionally Abridges Their Right of Free Association.

New York's statutory scheme imposes a "waiting period" of from eleven to fourteen months between petitioners' initial attempt to join the Democratic Party in December 1971 and their final acceptance as party members which will

" Another absurd result of Section 186 is that it permits a voter who has filed an enrollment blank declaring his enrollment in a new party to continue to participate in the affairs of his old party for a substantial period of time. Thus, an enrolled Democrat who had shifted his allegiance to the Republican Party and had completed a Republican enrollment blank in December 1971 was eligible to vote in the June 1972 Democratic primary. It is possible, therefore, that Section 186 actually encourages more bad faith raiding than it prevents.

occur sometime between November 14, 1972 and February 1, 1973. Since the result of such a statutorily imposed waiting period is the abridgement of petitioners' right to vote in the June Presidential Primary, New York's statutory scheme effects an unlawful abridgement of the franchise and is, therefore, invalid. See generally, Point I, *supra*. However, even if New York's deferred enrollment procedure did not abridge petitioners' right to vote, it would, nevertheless, unquestionably violate their right to associate freely with the political parties of their choice. No state may impose onerous restrictions upon an individual's ability to associate with the political party of his choice for the advancement of political goals. E.g. *Williams v. Rhodes*, 393 U.S. 23 (1968); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Gibson v. Florida Legislative Investigations Committee*, 372 U.S. 539 (1963); *DeGregory v. Attorney General*, 383 U.S. 825 (1966); *United States v. Robel*, 389 U.S. 258 (1967); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark., 1968), *aff'd per curiam* 393 U.S. 14 (1968).

In *Williams v. Rhodes*, *supra*, this Court recognized that the right to associate with a political party for the advancement of political goals was protected against state encroachment by the First Amendment. Mr. Justice Black, writing for the Court in *Williams v. Rhodes*, *supra*, stated:

"In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights of course,

rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States." 393 U.S. at 30-31. See also, Mr. Justice Douglas' concurrence, 393 U.S. at 35-38.²⁰

In his concurring opinion in *Williams v. Rhodes, supra*, Mr. Justice Harlan described the role which freedom of association plays in the political process. Indeed, Mr. Justice Harlan expressly disclaimed reliance upon the equal protection analysis utilized by the Supreme Court in the *Kramer-Evans-Dunn* line of authority. Thus, he recognized that the right to join a political party, free from undue state interference, is at the very core of our associational freedoms protected by the First Amendment.

In *Carter v. Dies*, 321 F. Supp. 1358 (N.D. Tex., 1970), *aff'd sub nom. Bullock v. Carter*, — U.S. —, 31 L. Ed. 2d 92 (1972), this Court ruled that a Texas requirement of a substantial filing fee in order to participate in a Democratic Party Primary was unconstitutional. In his concurring opinion in the District Court, Judge Thornberry stated:

"At the very core of this dispute lies the First Amendment's guarantee of the right to engage in association

²⁰ Mr. Justice Douglas, in language strikingly appropriate to this case observed in *Williams v. Rhodes, supra*:

"Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote." 393 U.S. at 40.

for the advancement of beliefs and ideas. . . ." 321 F. Supp. at 1363.

Thus, to the extent that New York's statutory scheme places obstacles in the path of petitioners' association with the party or parties of their choice and inhibits them from voting in the June primary, it impinges upon petitioners' First Amendment associational rights.

State statutes, such as New York's Election Law, which inhibit free association have been declared unconstitutional under two analyses. Many courts have ruled that such direct restraints on free association are absolutely invalid. E.g. *United States v. Robel*, 389 U.S. 258 (1967); *Boorda v. Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir., 1969), cert. den. 397 U.S. 1042 (1970); *Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (Mr. Justice Douglas concurring). Other courts have ruled that restraints on associational freedom can pass rigorous constitutional scrutiny only if they survive a stringent balancing test in which the state must demonstrate the existence of an overriding societal interest which may be advanced by no less drastic means. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark., 1968), *aff'd per curiam* 393 U.S. 14 (1968).

If the "absolute" analysis of *United States v. Robel*, *supra*, is applied to New York's deferred enrollment scheme, it is, of course, unconstitutional as a direct abridgement on free association.

If the "balancing" analysis of *NAACP v. Alabama*, *supra*, is applied, it is clear that New York's scheme is unconstitu-

tionally overbroad and far more Draconian than necessary. See *Shelton v. Tucker*, 364 U.S. 479 (1960).

Certainly, New York cannot contend that it possesses an overriding societal interest in protecting political parties against previously unaffiliated new voters who seek merely to declare their initial party affiliation. Indeed, New York's interest in deferring petitioners' affiliation with the Democratic Party is even weaker than the state interests unsuccessfully urged by Alabama, Arkansas, Florida and New Hampshire, in *NAACP v. Alabama*, *supra*; *Bates v. Little Rock*, *supra*; *Gibson v. Florida*, *supra*; and *DeGregory v. New Hampshire*, *supra*.²¹

III.

Section 186 of New York's Election Law Establishes an Unconstitutional Durational Residence Requirement for Voting in a New York Primary Election.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court recognized that freedom to travel throughout the United States is one of the fundamental personal rights protected by the Constitution. See also, e.g. *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C.J.); *Edwards v. California*, 314 U.S. 160 (1941); *Oregon v. Mitchell*, 400 U.S. 112, 237 (opinion of Brennan, White and Marshall, JJ.), 285-286 (opinion of Stewart, Burger and Blackmun, JJ.).

In *Dunn v. Blumstein*, — U.S. —, 31 L. Ed. 2d 274 (1972), this Court recognized that durational residence

²¹ As petitioners have demonstrated, Section 186 is certainly not the least drastic means available to guard against fraudulent enrollments. See Point I(c), *supra*, at pp. 24-34.

voting requirements directly impinged upon the right to travel by singling out newly arrived residents and denying them access to the ballot.

Section 186 of New York's Election Law singles out all persons who have established a residence in New York subsequent to New York's last preceding general election and prohibits them from voting in a primary election. Thus, all persons who established a residence in New York after October 2, 1971 (the last day to register for the November 1971 elections), were barred from voting in the June primary regardless of the duration of their pre-existing political affiliation.²²

Chief Judge Mishler explicitly noted that Section 186 imposes a durational residence requirement for primary voting in New York. He stated:

"It also needs little explanation that the waiting period mandated by the enrollment box system before an enrollment can become effective is a durational residency requirement. This residency requirement may vary in duration from one to eleven months, depend-

²² In *Jordan v. Meisser*, — U.S. —, 40 USLW 3398 (Feb. 22, 1972) this Court dismissed the appeal of a Georgia resident who had moved to New York and sought to re-establish his long time affiliation with the Democratic Party, but who was barred by Section 186. Unfortunately, in *Jordan*, the Attorney General of New York inadvertently misstated New York law by asserting that Jordan was eligible for special enrollment pursuant to Section 187 of the Election Law. Acting upon the Attorney General's incorrect representation, this Court dismissed Jordan's appeal for want of a substantial Federal question. However, during argument before the court below, the Nassau County Attorney correctly informed the court that Section 187 applies only to persons whose new residence is within the same county as his old residence. *Election Law* §187(c)(6). The Attorney General does not dispute the Nassau County Attorney's reading of the statute, which, indeed, reflects the practice followed throughout New York State.

ing on the time of year the enrollment blank is filled out and put in the box (registration and signing of enrollment blanks are closed during the thirty days before and after the general election). It is a durational residency requirement imposed in *addition* to the ninety days residence required to vote in a general election" (A 45).

The court below did not declare Section 186 unlawful as a durational residence requirement for voting because, reversing Chief Judge Mishler, it ruled that the 1970 amendments to the Voting Rights Act of 1965 (42 U.S.C. §1973a-a (1)), which invalidated durational residence requirements in Presidential elections, did not apply to primary elections.²² However, given this Court's decision in *Dunn*, the applicability of the durational residence bar contained in the

²² At the time Chief Judge Mishler delivered his opinion, this Court had not yet announced its decision in *Dunn v. Blumstein*, *supra*. Although the decision in *Dunn* has rendered Chief Judge Mishler's construction of Title 42 U.S.C. 1973a-a(1) largely academic, it seems infinitely preferable to the narrow reading of the Voting Rights Act given by the court below. It is inconceivable to assume that Congress, in enacting major legislation designed to guaranty meaningful participation in Presidential elections, did not intend to protect participation in Presidential primaries as well. Congress, no less than this Court, recognizes that participation in the nominating process is an integral aspect of voting. Congress has expressly provided that, for the purposes of the Voting Rights Act, the right to vote includes the right to participate in a primary. Title 42 U.S.C. §1973(c)(1), the definitional section of the Voting Rights Act, provides that the term "voting" "shall include all action necessary to make a vote effective in any *primary*, special or general election . . ." (Emphasis added.)

Since the provisions of Title 42 U.S.C. §1973(a)(a) speak in terms of "voting" for president and vice-president, there is no reason to suppose that Congress intended to use the phrase "voting" in other than its statutorily defined sense. Thus, "voting for president and vice-president" must mean participating not only in the general election, but in the nominating process as well.

Voting Rights Act is no longer determinative. After *Dunn*, Section 186 is unlawful, not because it imposes a durational residence requirement in violation of the Voting Rights Act, but because this Court has ruled that such durational residence requirements unconstitutionally impinge upon fundamental constitutional rights. Thus, Section 186 is in direct contravention of *Dunn v. Blumstein, supra*.

New York asserts that although Section 186 concededly barred all persons who established a residence in New York after the general election in November 1971 from voting in the June 1972 primaries, petitioners lack standing to urge the obvious conflict between Section 186 and *Dunn v. Blumstein, supra*. However, petitioners, as otherwise qualified voters who were concededly barred from voting in the June 1972 Presidential Primary solely because of the operation of Section 186, possess unquestioned standing to attack the statutes' deferred enrollment procedures and to raise all arguments demonstrating their unconstitutionality. Once a prospective voter is demonstrably injured by the operation of a statute restrictive of the franchise, he must be permitted to demonstrate that the statute's unconstitutional impact is felt across the entire spectrum of the electorate, cf. *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940); *Flast v. Cohen*, 392 U.S. 83 (1968). Moreover, as representatives of the class of people affected by the presently written statute, petitioners, in this class action,²⁴ possess classic standing to discuss the unconstitutional impact of Section 186 upon all members of the class.

²⁴ Chief Judge Mishler explicitly recognized the class action aspects of this case (A 22).

IV.

New York's Deferred Enrollment Scheme Which Conditions Full Participation in the 1972 Electoral Process Upon Past Participation in the 1971 Electoral Process Is an Unconstitutional "Grandfather Clause" in Violation of the Fourteenth, Fifteenth, and Twenty-sixth Amendments.

In order to participate in the June 1972 Presidential Primary, New York's statutory scheme required petitioners to have been registered to vote in the November 1971 local elections. In effect, therefore, New York has established a "grandfather clause" which conditions full participation in the 1972 Presidential election upon past participation in 1971 local elections. Since such "grandfather clauses" inevitably fall with disproportionate force upon hitherto unregistered members of racial or ethnic minorities and persons having recently attained voting age, they violate the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.

A. "Grandfather Clauses" and the Right to Vote.

Grandfather clauses are, unfortunately, not unknown to the American experience. In two cases, this Court has unequivocally ruled that to the extent grandfather clauses act to inhibit full participation in the electoral process, they are unconstitutional. *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939).

In *Guinn*, this Court was faced with an Oklahoma grandfather clause which confined registration without a literacy test to those persons who could demonstrate that a lineal ancestor had participated in an election prior to the Civil

War. Although the clause was non-discriminatory on its face, it obviously fell with disproportionate force upon that segment of the electorate enfranchised by the Fifteenth Amendment. Accordingly, this Court declared it unconstitutional.

In *Lane v. Wilson, supra*, this Court dealt with a second Oklahoma grandfather clause, passed in response to *Guinn*, which confined registration in the absence of a literacy test to those persons whose lineal ancestors either had participated in a pre-Civil War election or had registered during a grace period in 1916. It was conceded that the clause was non-discriminatory on its face and was being applied in an even-handed manner. Nevertheless, this Court, speaking through Mr. Justice Frankfurter, declared the statute unconstitutional because its effect was to frustrate the implementation of the Fifteenth Amendment. In words appropriate to this case, Mr. Justice Frankfurter stated:

"The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicapped exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." 307 U.S. at 275.

Just as the Oklahoma grandfather clauses condemned by *Guinn v. United States, supra*, and *Lane v. Wilson, supra*, inevitably fell with disproportionate effect upon the beneficiaries of the Fifteenth Amendment, so New York's grandfather clause unduly abridges the ability of the beneficiaries of the Fifteenth and Twenty-Sixth Amendments to participate in the electoral process.

See generally, *Gangemi v. Rosengard*, 44 N.J. 166, 207 A.2d 665 (1965); *Goetsch v. Philhower*, 60 N.J. Super. 582, 160 A.2d 60 (N.J. Super. 1960); *Cottingham v. Vogt*, 60 N.J. Super. 576, 160 A.2d 57 (N.J. Super. 1960), invalidating similar provisions of New Jersey's election laws.

B. *The Impact of New York's Statutory Scheme Upon Hitherto Unregistered Members of Racial Minorities.*

It is a stark reality that fewer than 50 percent of the qualified voters in New York, Kings and Bronx Counties participated in the 1970 general elections.

It is universally agreed that the overwhelming incidence of non-registration occurs in New York City's black and Puerto Rican ghettos. Indeed, conservative estimates indicate that over one million qualified members of racial minorities have failed to register to vote in New York City alone. Therefore, it is axiomatic that provisions conditioning full participation in the current electoral process upon some degree of past participation in past elections must inexorably bear most heavily upon the mass of black and Puerto Rican electors who have failed to participate in prior elections for reasons ranging from ignorance to despair. Instead of encouraging this mass of unregistered voters to participate in the 1972 Presidential election, New York's statutory scheme perpetuates their exclusion from the democratic process by rendering them ineligible to vote in the June primaries. Thus, to the extent that hitherto unregistered members of racial or ethnic minorities wish to involve themselves in the democratic process—perhaps because a particular Presidential candidate has captured their affections or loyalty—New York prohibits them from doing so. Such a prohibition, keyed as it is to a failure to

have registered to vote in past elections, is in clear violation of the Fifteenth Amendment. *Guinn v. United States*, *supra*; *Lane v. Wilson*, *supra*.

C. *The Impact of New York's Statutory Scheme on Persons Having Recently Attained Voting Age.*

The United States Census Bureau estimates that approximately 950,000 persons between the ages of 18-21 were enfranchised by the passage of the Twenty-Sixth Amendment in New York State. However, New York's statutory scheme prohibited the beneficiaries of the Twenty-Sixth Amendment who attained the age of eighteen prior to November 2, 1971, from participating in the June primary elections unless they registered to vote in the November 1971 local elections. Thus, approximately 80 percent of the beneficiaries of the Twenty-Sixth Amendment in New York State were disqualified from participating in the June Presidential Primary solely because they failed to register to vote in local 1971 elections.

The Twenty-Sixth Amendment expressly prohibits the denial or abridgement of the franchise on account of age. Since New York's statutory scheme virtually nullified the Twenty-Sixth Amendment as applied to the June Presidential Primary, it is clearly an abridgement of the franchise. Moreover, since the abridgement is based upon a young voter's failure to have registered for a single local election of limited interest (the only election for which he ever qualified), it is a discriminatory abridgement based upon age.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed and the judgment of the United States District Court for the Eastern District should be reinstated.

Respectfully submitted,

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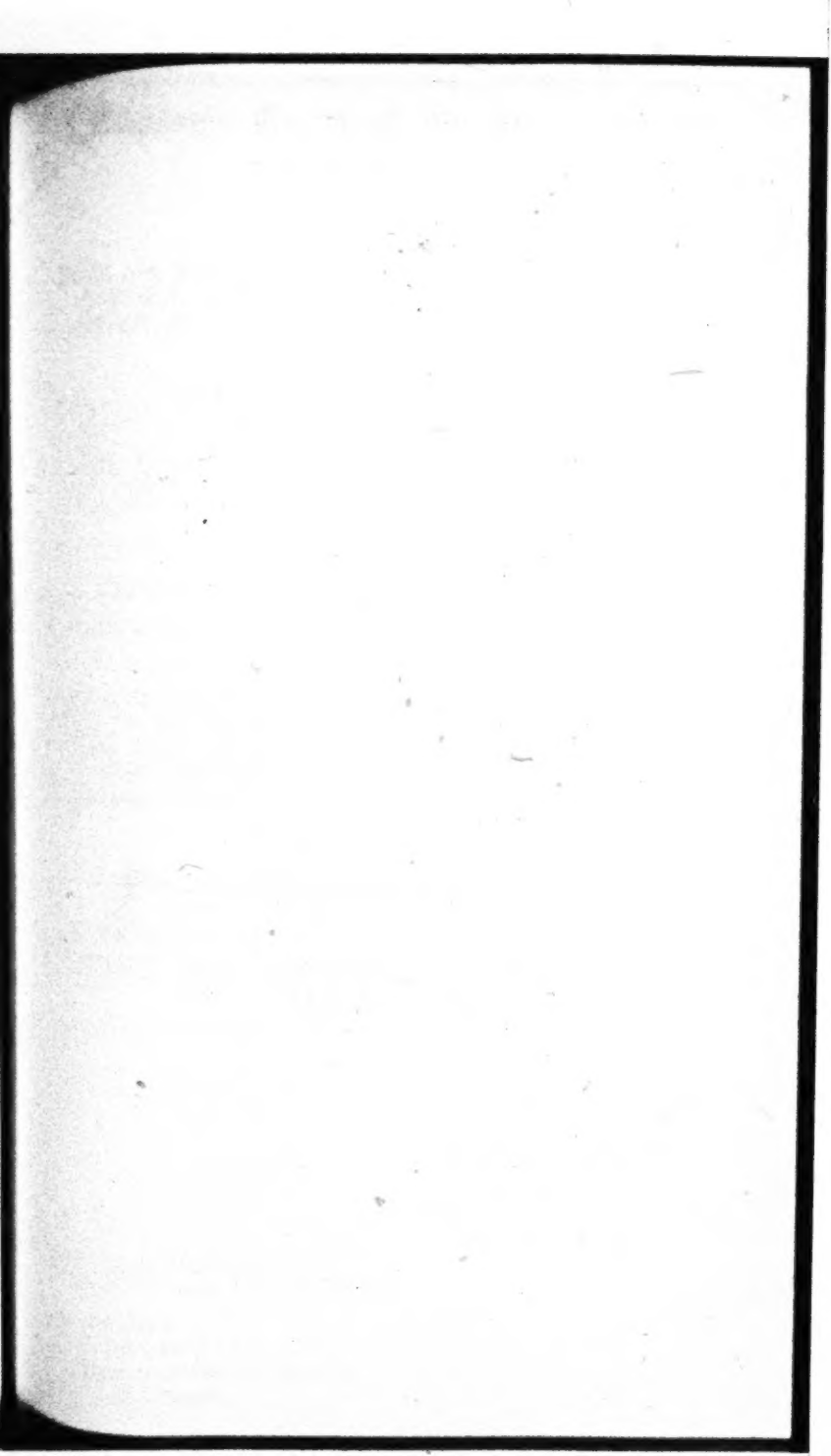
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Dated: June 30, 1972



Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1371

SEP 14 1972

MICHAEL BODAK, JR., C

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN
LEE GOTTESMAN, individually and on behalf of all others
similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of the State of New York,
JOHN P. LOMENZO, Secretary of State of The State of
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENTS ROCKEFELLER
AND LOMENZO**

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	4
Proceedings Below	5
Summary of Argument	6
 POINT I—The Supreme Court has previously con- sidered the issue and found no substantial fed- eral question. It also has considered similar statutes and upheld them	7
A. The Supreme Court's Prior Consideration ..	7
B. The Compelling State Interest	9
 POINT II—It is entirely proper to apply the tradi- tional "rational basis" test to § 186	15
 POINT III—Election Law § 186 does not unduly bur- den the exercise of any First Amendment rights	21
 POINT IV—§ 186 is the least drastic means to achieve a compelling state interest, is not a durational residency requirement and is totally nondiscrim- inatory	25
A. The Least Drastic Means	25
B. The Lack of a Durational Residence Issue ..	26
C. The Non-discriminatory Nature of § 186	27

	PAGE
POINT V—The petitioners have waived their claimed constitutional rights, if any	28
Conclusion	30

CASES

<i>Addabbo v. O'Rourke and Friedman</i> , 27 N.Y. 2d 645, 261 N.E. 2d 904 (1970), appeal dismissed <i>sub nom. Friedman v. O'Rourke</i> , for want of a substantial federal question, 400 U.S. 884 (1970) ..	7,9
<i>Adickes v. Kress & Co.</i> , 398 U.S. 144, 147 (ftn. 1), 90 S. Ct. 1598 (1970)	26
<i>Alexander v. Todman</i> , 337 F. 2d 962, 969 (3rd Cir. 1964), <i>cert. denied</i> 380 U.S. 915	11, 14
<i>Bachrow v. Rockefeller</i> , 71 Civ. 930, Eastern District of New York, three-judge court, September 8, 1971	4, 5, 27
<i>Board of Registration Commissioners v. Campbell</i> , 251 Ky. 597, 65 S.W. 2d 713, 719 (1933)	20
<i>Bullock v. Carter</i> , 405 U.S. 134, 143, 92 S. Ct. 849 (1972)	15
<i>Carrington v. Rash</i> , 380 U.S. 89, 91, 85 S. Ct. 775 (1966)	15
<i>Dunn v. Blumstein</i> , 405 U.S. 330, 31 L. Ed. 2d 274 ...	19, 26
<i>Fidell v. Board of Elections</i> , 343 F.Supp 913 (three-judge court, E.D.N.Y., 1972), app. pdg. 72-175 ..	19
<i>Fontham v. McKeithen</i> , 336 F. Supp. 153, 162 (E.D. La. 1971) app. pdg. 92 S. Ct. 999, 31 L. Ed. 2d 279	27

TABLE OF CONTENTS

iii

	PAGE
<i>Friedman v. State of New York</i> , 24 N. Y. 2d 528, 538, 249 N.E. 2d 369 (1969), appeal dismissed 397 U.S. 317 (1970)	8
<i>Gaunt v. Brown</i> , 341 F. Supp. 1187 (S. D. Ohio, 1972)	18
<i>Glenn v. Gnau</i> , 251 Ky. 3, 64 S.W. 2d 168, 172 (1933)	20
<i>Gordon v. Executive Committee of the Democratic Party of Charleston</i> , 335 F. Supp. 166 (D. S.C. 1971)	23
<i>Golden v. Zwickler</i> , 394 U.S. 103 (1969)	29
<i>Goosby v. Osser</i> , 452 F. 2d 39 (3rd Cir. 1971)	18
<i>Gray v. Sanders</i> , 372 U.S. 368, 83 S. Ct. 801 (1963) ..	9
<i>Hennegan v. Geartner</i> , 186 Md. 551, 47 A. 2d 393 (1946)	20
<i>Ingersoll v. Heffernan</i> , 297 N.Y. 524, 74 N.E. 2d 466 (1947)	9
<i>Jenness v. Fortson</i> , 403 U.S. 431, 91 S. Ct. 1970 (1971)	18
<i>Jordan v. Meisser</i> , 29 N.Y. 2d 661 (1971), appeal dis- missed, — U.S. —, 92 S. Ct. 947 (1972)	7
<i>Kramer v. Union Free School District</i> , 395 U.S. 621, 625, 89 S. Ct. 1886 (1969)	15
<i>Lippitt v. Cipollone</i> , 404 U.S. 1032, 92 S. Ct. 729 (1972)	8, 11, 13, 15, 21, 25
<i>McDonald v. Board of Election Comm. of Chicago</i> , 394 U.S. 802, 89 S. Ct. 1404 (1969)	15, 25
<i>MacDougall v. Green</i> , 335 U.S. 281, 69 S. Ct. 1 (1948)	15
<i>Matter of Davis v. Board of Elections</i> , 5 N.Y. 2d 66, 69, 153 N.E. 2d 879 (1958)	29

- Matter of Vitale v. Cristenfeld*, New York Law Journal, August 30, 1971, p. 14, col. 3 (Sup. Ct. Nassau Co., 1971); aff'd 37 A.D. 2d 775 (2nd Dept. 1971) 29
- Matter of Zuckman v. Donahue*, 274 App. Div. 216, 80 N.Y.S. 2d 698 (3rd Dept. 1948), aff'd 298 N.Y. 627 (1948) 13, 25
- Nagler v. Stiles*, — F. Supp. — (D.N.J., May 26, 1972) 22, 23
- Nixon v. Herndon*, 273 U.S. 536, 47 S. Ct. 446 (1927) 9
- Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260 (1970) 17, 9, 21
- Pontikes v. Kasper*, — F. Supp. — (N. D. Ill., March 9, 1972) 19, 22, 23
- Ray v. Blair*, 343 U.S. 214, 72 S. Ct. 654 (1952) 14
- Redgate v. Boston Redevelopment Authority*, 311 F. Supp. 43, 47 (D. Mass., three-judge court, 1969) 29
- Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757 (1944) 14
- Socialist Labor Party v. Rhodes*, 290 F. Supp. 983 (S.D. Ohio, 1968), aff'd 393 U.S. 23 (1968) 10, 23
- State v. Felton*, 77 Ohio St. 554, 84 N.E. 85, 89 (1908) 20
- United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031 (1941) 14
- United States v. Gradwell*, 243 U.S. 476, 37 S. Ct. 407 (1917) 9
- Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968) ... 14, 15
- Zucht v. King*, 260 U.S. 174, 43 S. Ct. 24 (1922) 8

TABLE OF CONTENTS

v

STATUTES CITED

	PAGE
New York Election Law:	
§ 137	9, 10
§ 150-188	10
§ 186 2, 3, 4, 5, 6, 7, 10, 11, 12, 14, 15, 18, 20, 21, 23, 24, 26, 27, 28	
§ 174	11
§ 187	14, 17, 26, 28
§ 188	29
§ 369	11
§ 332	11, 13, 25
§ 2	12
Ohio Rev. Code § 3313.191	11
§ 3513.05	12
§ 3513.19	13
28 U.S.C. § 1254(1)	2
§ 2201 et seq.	5
42 U.S.C. § 1983	5

MISCELLANEOUS

Stern and Gressman, <i>Supreme Court Practice</i> , pp. 198 et seq.	8
Ten Vote Registration, New York Post, May 12, 1972	28
18-20 Group Lags on Registering to Vote, New York Times, August 13, 1972	

TABLE OF CONTENTS

1	Introduction
2	Chapter I. The History of the United States
3	Chapter II. The Constitution of the United States
4	Chapter III. The Federal Government
5	Chapter IV. The State Governments
6	Chapter V. The Local Governments
7	Chapter VI. The Judiciary
8	Chapter VII. The Executive
9	Chapter VIII. The Legislative
10	Chapter IX. The Finance
11	Chapter X. The Education
12	Chapter XI. The Religion
13	Chapter XII. The Social
14	Chapter XIII. The Literature
15	Chapter XIV. The Art
16	Chapter XV. The Science
17	Chapter XVI. The Industry
18	Chapter XVII. The Commerce
19	Chapter XVIII. The Transportation
20	Chapter XIX. The Communication
21	Chapter XX. The Health
22	Chapter XXI. The Environment
23	Chapter XXII. The Future

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1371

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County,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENTS ROCKEFELLER
AND LOMENZO**

Opinions Below

1. Opinion of District Court declaring New York Election Law § 186 unconstitutional, February 10, 1972 (21).*
2. Opinion of Second Circuit reversing District Court and holding New York Election Law § 186 constitutional, April 7, 1972. Reported below at 458 F. 2d 649 (64).
3. Order of Supreme Court granting certiorari, but denying motion for summary reversal, expedited consideration and a stay (80).

Jurisdiction

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Do the complaints present a substantial federal question?
2. Did New York Election Law § 186 unconstitutionally deprive petitioners of the right to vote in the 1972 New York primary when they were eligible to timely do so before the last general election, but failed to so enroll?

The Court of Appeals for the Second Circuit answered "no."

* Unless otherwise indicated, numbers in parentheses refer to pages of the Appendix in this Court.

Statute Involved

New York Election Law § 186

"§ 186. Opening of enrollment box and completion of enrollment

All enrollment blanks contained in the enrollment box shall remain in such box and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers to the effect that it has correctly and properly

transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first of February in each year."

Statement of the Case

These actions were instituted to challenge the constitutionality of New York Election Law § 186 as applied to qualified voters who failed to register as such and enroll in a party on or before the 1971 general election, with the result they could not vote in the next following primary (22, 58).

Rosario—The three named petitioners were newly registered voters who all registered on December 3, 1971 and allegedly enrolled in the Democratic Party. Petitioner Pedro J. Rosario was eighteen years old, the minimum age for voting. The record does not disclose when he attained eighteen. The other two petitioners, William J. Freedman and Karen Lee Gottesman, were over twenty-one and could have effectively registered with a party for the 1972 primary during or prior to the October 1971 general registration. By operation of § 186 they were not enrolled party members for the 1972 primary, since they are commonly considered in New York as "in the box." (See Statute Involved, *supra* p. 3).

Eisner—The sole named petitioner here was a newly registered voter who registered on December 13, 1971 and allegedly enrolled in the Democratic Party. He similarly could have registered effectively with a party for the 1972 primary during the October 1971 general registration or before. By operation of § 186, he was not an enrolled party member for the 1972 primary.

These cases were the outgrowth of a similar case, *Backrow v. Rockefeller*, 71 Civ. 930, Eastern District of New York, three-judge court, September 8, 1971. That case was dismissed as moot since there were no primary contests

for those plaintiffs to vote in. *Bachrow* of course did not reach the merits.

The *Bachrow* attorneys, desirous of continuing the attack on Election Law § 186 and destroying the box, at least as to newly registered voters,* instituted the two instant actions. The complaints initially sought both a declaratory judgment and an injunction against § 186. On the return of the two orders to show cause to convene a three-judge court, the petitioners dropped the demand for an injunction leaving a request for a declaratory judgment declaring § 186 unconstitutional insofar as it prevented the petitioners from being enrolled in a party at the June 1972 primary.

The petitioners in the two complaints contended that New York's enrollment law unconstitutionally disqualified them and members of their class (although class action relief was not requested) from participating in the primary; and asked for a declaration that § 186 was unconstitutional. The *Eisner* complaint also claimed violation of the Voting Rights Act of 1970.

Proceedings Below

Invoking the jurisdiction of the District Court pursuant to 42 U.S.C. § 1983, petitioners alleged that New York Election Law § 186 was unconstitutional insofar as it prevented them from participating in any 1972 primary elections, since their party enrollments would remain sealed in a box until after the general election of November 1972. Both declaratory judgments and injunctions pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201 *et seq.* were sought. The demand for injunctive relief was withdrawn and the District Court granted a declaratory judgment against § 186.

* The *Bachrow* complaint presented the case of an enrolled voter who moved from one county to another and was "in the box", as well as the case of a newly enrolled voter.

On appeal by the State defendants and the Nassau County Board of Elections, the Court of Appeals for the Second Circuit unanimously reversed the District Court. Recognizing that New York had a compelling state interest in preventing party "raiding" and protecting party integrity, the opinion (LUMBARD, C.J.) found § 186 a reasonable regulation of the party primary process which could not be effected by less drastic means. Indeed it was praised as a highly effective part of New York's effort to minimize the possibility of debilitating political practices. The opinion used the high standard of "compelling state interest" in testing § 186. As noted, it met the test (Opinion and fn. 4, 69). The petitioners sought reargument *in banc* and a stay of judgment in the Court of Appeals. All were denied April 24, 1972.

The petitioners immediately applied to Justice MARSHALL for a stay of the Court of Appeal's judgment, which was granted temporarily April 26, 1972.

On consideration by the full bench, the stay was denied (80) but certiorari was granted May 31, 1972.

Summary of Argument

New York has a compelling state interest in limiting party enrollments and voting in a primary to properly enrolled party members. This is to protect party integrity. This Court has recognized this interest. It has ruled favorably on the law in several cases which presented the constitutionality of Election Law § 186 and the deferring of party enrollment.

While the challenged statute meets the compelling state interest test completely, it is not necessary to use this strict test. The statute involved is an incidental regulation of the electoral process to be tested by the rational basis test. There is no question presented in the instant case of the

fundamental right to vote. However, even applying the stricter standard, § 186 is the least drastic effective means available to achieve party integrity.

Election Law § 186 has a minimal effect on First Amendment rights because of its indirect method of protecting party integrity. It also is completely neutral to any minority or age groups, and does not present a durational residency question since the petitioners never lacked New York residence.

Finally, since the petitioners were eligible to enroll in time to vote in the primary they may very well have waived their rights by not performing a statutory duty.

POINT I

The Supreme Court has previously considered the issue and found no substantial federal question. It also has considered similar statutes and upheld them.

A. The Supreme Court's Prior Consideration

This is not the first time that substantially the same question of the constitutionality of Election Law § 186 was raised in the courts of the State of New York. Almost two years ago, one of the attorneys for the *Rosario* petitioners, Seymour Friedman, Esq., raised the same question as in the instant case for the first time, and was unsuccessful in this Court on an appeal from the New York Court of Appeals. *Addabbo v. O'Rourke and Friedman*, 27 N.Y. 2d 645, 261 N.E. 2d 904 (1970), appeal dismissed *sub nom. Friedman v. O'Rourke*, for want of a substantial federal question, 400 U.S. 884 (1970).^{*} *Friedman*

^{*} The issue of party membership as a requisite for running in a party primary was raised in *Jordan v. Meisser*, 29 N.Y. 2d 661 (1971). This Court dismissed the appeal for want of a substantial federal question, — U.S. —, 92 S. Ct. 947 (Feb. 22, 1972). New York's statutory requirements are the same as for voting in a party primary.

is a decision on the merits, and binding upon this Court. When the Supreme Court declines jurisdiction of an appeal, finding the federal question to lack substantiality, *Zucht v. King*, 260 U.S. 174, 43 S. Ct. 24 (1922), the test is not the same as for certiorari. As the late Mr. Justice Harlan stated:

"... discretion to dispose of an appeal without argument should be exercised more sparingly than where the question is simply whether to review a case or not. The appellant in a case that is not obviously devoid of substance comes to the court as a matter of right, and disposition of such case involves adjudication on the merits with all of its consequences. On certiorari, on the other hand, a case reaches the court only by leave, and, as noted later, a denial of review carries none of the consequences of adjudication." Mr. Justice Harlan, 13 Record of N.Y.C.B.A. 541, 546 (1958).

See also Stern and Gressman, *Supreme Court Practice*, pp. 198 *et seq.* and *Friedman v. State of New York*, 24 N. Y. 2d 528, 538, 249 N.E. 2d 369 (1969), appeal dismissed 397 U.S. 317 (1970).

Since it would appear that the question of § 186 has been adjudicated by this Court so recently, such holding should be deemed dispositive to affirm the judgment of the Court of Appeals.

The Court of Appeals also properly noted the affirmance by the Supreme Court of a lower court decision which upheld a lower federal court finding that Ohio had a compelling state interest in seeking to protect the integrity of all political parties and membership therein. See *Lippitt v. Cipollone*, 404 U.S. 1032, 92 S. Ct. 729 (1972), *infra*, p. 11.

B. The Compelling State Interest

Assuming it were somehow possible to disregard or differentiate the *Friedman* case, *supra*, which it should be noted the Court of Appeals did not rely on, the judgment and opinion below is entirely correct.

The petitioners seek to equate a primary with a general election. However, the cases they cite on primaries deal with racial discrimination or electoral gerrymandering which would make the general election a farce. Thus state action which promotes or allows racial discrimination in the primary is constitutionally forbidden, *Nixon v. Herndon*, 273 U.S. 536, 47 S. Ct. 446 (1927), or likewise, violation of the one-man one-vote rule in state primaries, e.g., *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963). Of course, the Court can take judicial notice that all these decisions were in one-party states. The fact is that primaries are not the same as general elections and not all those who may vote at a general election may vote at a primary. This is immediately apparent when we recognize that a primary is not constitutionally required as is an election (United States Constitution, Art. IV, Sec. 4) but is purely a creature of statute. *United States v. Gradwell*, 343 U.S. 476, 37 S. Ct. 407 (1917). It is solely a party affair and simply a nominating device on the same level as a caucus or a convention. It is a method for members of a political party to express their preference in the selection of that party's candidates for public office. To insure this New York has limited participation in primaries to party members or enrollees. This is a "closed" primary. Unless the party committee approves, candidates in a primary must also be enrolled in the party; Election Law § 137. This has been upheld as constitutional, *Ingersoll v. Hefferman*, 297 N.Y. 524, 74 N.E. 2d 466 (1947), and does not raise a substantial federal question. *Friedman v. O'Rourke*, *supra*, p. 7. Therefore, New York has a right to be more restrictive in the operation of and in the participation in

primaries than with respect to the right to vote at a general election.

The basic nature of our political party system was at the heart of Judge Lumbard's opinion below. He said (68):

"The political parties in the United States, though broadbased enough so that their members' philosophies often range across the political spectrum, stand as deliberate associations of individuals drawn together to advance certain common aims by nominating and electing candidates who will pursue those aims once in office."

Similar views were expressed in *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 988 (S.D. Ohio, 1968), *affd. and modif.* 393 U.S. 23 (1968):

"We conceive a political party to be an organization of some permanence, consisting of electors who have some basic theories of government . . . Our primary election is an instrument for the functioning and government of parties."

In furtherance of these purposes and the operation of the primary, New York has provided a system for party enrollment which differs from voting registration. Art. 7 of the Election Law, §§ 150-188. While they take place at the same time they differ in purpose. Thus party enrollment qualifies a person, not to vote at the general election, but to participate in party affairs through the primary and the right to run for a nomination of a party office in a party primary; Election Law § 137.

New York has set up a system of deferred-effect party enrollment (with certain exceptions) to achieve important aims. Thus under § 186 all enrollment blanks during a year are placed in a box, the insidious instrument of petitioners' wrath. It is not opened until the Tuesday after the following general election. This has the effect of deferring a

prospective enrollee's participation in the party primary to the next year. There is a rational basis for the use of the box and it fulfills a vital state interest. Besides requiring a statement, § 174 of the Election Law, of general sympathy with the party and an intent to generally support it §§ 186 and 369(3), by deferring the effect of new party enrollments until after the next election, protect the integrity of political parties. This prevents a takeover of a party in the State or a particular locality through a sudden influx of new enrollees by an outside group, who have no sympathy with its long term aims and objectives. See *Alexander v. Todman*, 337 F. 2d 962, 969 (3rd Cir. 1964), cert. denied 380 U.S. 915. Internal party matters should not be the concern of the courts absent fraud.

Election Law § 186 also gives the party an opportunity to scrutinize new enrollees to determine whether they are truly in sympathy with its principles and whether the party enrollment is subject to cancellation pursuant to Election Law § 332(2).

The view that a limitation on freedom of association to preserve "the formation of recognizable, relatively stable political parties with their own leadership, goals and philosophies", see 404 U.S. at 1033, is a legitimate State concern and a compelling state interest and not a matter of conjecture. In *Lippitt v. Cipollone*, 404 U.S. 1032 (1972), this Court affirmed a lower three-judge court in Ohio, 337 F. Supp. 1405, — (N.D. Ohio 1971), on this point. Ohio Rev. Code § 3313.191 provided that "[n]o person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." Other provisions attacked required those working for primary candidates or signing their nominating petitions to be members of the party in which nomination is sought *id.*,

§ 3513.05. The appellant had voted as a Republican in the 1970 primary and later sought the nomination of a minority party. The District Court held, and this Court affirmed, there was no violation of any constitutionally protected rights:

"The compelling State interest the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent 'raiding' of one party by members of another party and to preclude candidates from '... altering their political party affiliations for opportunistic reasons.' *State ex rel. Bible v. Board of Elections*, 22 O.S. 2d 57 (1970). Protection of party membership uniformly applied to all parties cannot be characterized as 'invidious discrimination' as defined in *Williams v. Rhodes*, 393 U.S. 23 (1968)]." 337 F. Supp. 1405, 1406 (N.D. Ohio 1971).

New York Election Law § 186 is a much more limited restriction on participation in the political or primary process. Candidates and voters in primaries must meet the same requirements. It also has the same legitimate purpose of preserving party integrity. The reversed District Court judgment would have allowed party switches without limit and, in effect, substituted an "open" primary for a statutorily required "closed" primary.

The maintenance of party integrity is particularly important in view of the fact that New York recognizes not only two major parties, Republican and Democratic, but also two "third parties", Conservative and Liberal. Election Law § 2, subd. 4. The latter two are particularly susceptible to takeovers, as was noted by the Court of Appeals (68, fn. 3). The history of our State shows that § 186 allows third parties to flower without fear of a sudden influx of major party adherents who would destroy them and then return to the two-party system. In *Matter of*

Zuckman v. Donahue, 274 App. Div. 216, 80 N.Y.S. 2d 698 (3rd Dept. 1948), aff'd 298 N.Y. 627 (1948), an action was brought under § 332, subd. 2 of the Election Law to cancel enrollments in the former American Labor Party. The court upheld most of the cancellations, and said the "legislative pattern is clearly designed to safeguard the integrity of minor parties and to prevent raids thereon by those out of sympathy with their principles and motives". Forcefully the court expressed the following vital concern of the State, 274 App. Div. at 218:

"Enrollment and attempted seizure of party machinery for the purpose of advancing the fortunes of another political party will not be tolerated."

While not so important to the major parties, the "box" and deferred enrollment give third parties an opportunity to protect their integrity under § 332, subd. 2. Furthermore, persons wishing to change enrollments or join parties for immediate ulterior motives are less likely to do so since before the general election they tend to identify with the party they will vote for (see Opinion, 70). This is not to say that petitioners have such a motive but the existence of persons who wish to use the enrollment and primary process for ulterior motives, *Zuckman v. Donahue*, *supra*, gives a rational basis for use of the "box". This is a reasonable regulation of the primary process and a compelling state interest. *Lippitt v. Cipollone*, *supra*.^{*} The fact that petitioners alleged they did not wish to change their enrollments does not detract from the force of the above.

^{*} *Lippitt* also upheld a requirement that a person seeking to change party affiliation execute an affidavit affirming that he voted for a majority of the candidates of the party with which he seeks affiliation at the last general election. Ohio Rev. Code § 3513.19. Of course without violating the secrecy of the ballot box this could not be verified. Judge Lumbard in *Rosario* noted New York need not choose ineffective means (72) such as the Ohio affidavit represents.

Non-registrants are typically a group open to organizing by persons who wish to raid a party. Certainly § 186 does not completely prevent takeovers but it reduces the likelihood substantially, placing such tactics in the context of a contest between party members and not a "raid" by party-switchers or organized independents.

Thus New York has a constitutionally valid interest in the protection of party integrity, and that includes all parties. *Ray v. Blair*, 343 U.S. 214, 72 S. Ct. 654 (1952); *Alexander v. Todman*, *supra*. The former case at pp. 225-227 shows that *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031 (1941) and *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757 (1944), both relied on by the reversed District Court, are not to be mechanically applied in primary cases.

In addition, the provision for transfers and special enrollments, Election Law § 187, generally for those who are first entering the electoral process, enables a substantial portion of those who have not had a prior opportunity to take part in New York's party system, to do so.* Thus, first time voters, members of the armed forces, newly-arrived residents and persons ill at the last enrollment period all can obtain special enrollments up to 30 days before the primary. § 187, subd. 2a-g. These groups are less likely to have ulterior motives or to be "ringers". That petitioners may not be able to effectively enroll can be admitted. Even in cases involving the electoral process—

"It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5 (1968).

* The Court of Appeals' opinion (72, fn. 5) recognized § 187 as an indication that New York is not opposed to later enrollment per se.

Only "invidious" distinctions are violations, *Williams v. Rhodes*, at 30. Election Law § 186, as a regulation of the party system holding a vital state interest, should be beyond challenge. *Lippitt v. Cipollone*, *supra*; *Kramer v. Union Free School District*, 395 U.S. 621, 625, 89 S. Ct. 1886 (1969); *Carrington v. Rash*, 380 U.S. 89, 91, 85 S. Ct. 775 (1966); *MacDougall v. Green*, 335 U.S. 281, 69 S. Ct. 1 (1948). As this Court said in *Bullock v. Carter*, 405 U.S. 134, 143, 92 S. Ct. 849 (1972):

"Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."

It is important to note that New York did not prevent the petitioners from effectively enrolling in a party. They had the opportunity and statutory right to do so effectively before the general election of November 1971 and thus vote in the next primary.

POINT II

It is entirely proper to apply the traditional "rational basis" test to § 186.

While we have demonstrated that there is a compelling state interest present, and indeed, contrary to petitioners' insinuations, Brief for Petitioners, p. 24, the Court of Appeals applied this test (69, fn. 4), it is proper to apply traditional equal protection standards to petitioners' claims. In *McDonald v. Board of Election Comm. of Chicago*, 394 U.S. 802, 89 S. Ct. 1404 (1969), this Court unanimously rejected the argument that the "compelling state interest" test applied to determine the right of unsentenced jail inmates to receive absentee ballots for a general election. The Court also found no problem under the rational basis test. In so concluding the Court extensively analyzed the two standards of equal protection. This

analysis, found in a voting case, should conclusively demonstrate the inapplicability of the stricter standard of "compelling state interest" to the instant case. At 394 U.S., pp. 807-809, it showed that it was not necessary to use the extreme test of "compelling state interest":

"Such an exacting approach is not necessary here however, for two readily apparent reasons. *First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption that Illinois has in fact precluded appellants from voting.*" (Emphasis supplied)

The opinion then explained and applied the traditional "rational basis" approach:

"We are then left with the more traditional standards for evaluating appellants' equal protection claims. Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently and the presumption of statutory validity that adheres thereto, admits of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. . . . and a legislature need not run the risk of losing an entire remedial scheme simply because

it failed, through inadvertance or otherwise, to cover every evil that might conceivably have been attacked."

It is apparent that New York's statutory scheme does not effect petitioners' *fundamental* right to vote. None of the petitioners will be unable to vote in the general 1972 election. Further, New York's exceptions by special enrollment need not concern us. Election Law §187. A statute cannot cover every contingency that might conceivably arise. New York has a rational party enrollment statute designed to achieve certain aims. It has also, as noted, carved out special exceptions.

The decision in the eighteen-year old voters case, *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260 (1970), is strong authority for the view that the Equal Protection Clause of the Fourteenth Amendment was never intended to have any reference to voting qualifications. See 400 U.S. at p. 124. At 125-126 Justice Black in his opinion said:

"It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. . . . And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-Fourth Amendments superfluous."

And at 127:

"The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection."

Justice Harlan's views at 400 U.S., 152-215 are even stronger. In a thorough historical exposition the late Justice shows that the framers of the Equal Protection Clause

never intended to apply it to voting in state and local elections. Five of the Justices concluded that Congress did not have the power under the Fourteenth Amendment enforcement provision to control voter age in state and local elections. Therefore it follows that a claim of abridgment of the franchise in a state and local election should not be allowed without any further allegations as to race, wealth or age. In the last category, age, § 186 is completely neutral, contrary to petitioners' claims. (See Point IV, *infra*, p. 27.)

Certainly, a party primary, as in the instant case, does not fall within the "compelling state interest" test. It traditionally has been a matter of solely state concern. It is fair to say that in an area to which "equal protection has doubtful application, the "compelling interest" test has no place. This Court has affirmed the state's right to run its own political process in *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970 (1971). The Court should now take this opportunity to state the right of New York to set up a rational system of party enrollments as one of the powers reserved to the State under the Tenth Amendment.*

A number of recent cases support the conclusion that the compelling state interest test has no application to cases involving regulations of the electoral process traditionally within a state's cognizance, such as age, residence and absentee ballots. See *Gaunt v. Brown*, 341 F. Supp. 1187 (S. D. Ohio, 1972); *Goosby v. Osser*, 452 F. 2d 39 (3rd Cir. 1971). Regulations setting forth the mechanics of controlling the exercise of the franchise, such as § 186 does with the instant petitioners, are measured by the reasonable basis test. *Goosby* at 40.

* "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are preserved to the States respectively, or to the people." U. S. Constitution, Amend. X.

In a similar vein it was said in *Fidell v. Board of Elections*, 343 F. Supp. 913 (three-judge court, E.D.N.Y., 1972):

"We hold that the State of New York has demonstrated a rational basis for failing to provide for absentee balloting in primary elections, and that the existence of such a rational basis is a sufficient ground for dismissing the present complaint. As the Supreme Court said in *Bullock v. Carter*, 405 U.S. 134, 143 (1972), 'Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.' The cases applying such stringent standards as a compelling state interest and striking down state practices have involved exclusion from the ballot of a class of voters on grounds far different from those presented in the present case."

Blind application of the "compelling state interest" test would mean that state codes regulating the electoral process would fall whenever a litigant shows he is prevented from voting for whatever reason. Cf. *Oregon v. Mitchell*, *supra*, 400 U.S. at 294, 91 S. Ct. at 349 (1970, Stewart, J.); *Dunn v. Blumstein*, 405 U.S. 330, 31 L. Ed. 2d 274, 296 (1972, dissent of BURGER, C.J.). In the instant case, New York has a compelling state interest and can use efficient means to achieve that end.

Perhaps this is the proper point to note the dissenting view of the compelling state interest test in *Pontikes v. Kusper*, — F. Supp. — (N. D. Ill., 3/9/72), as to what must be demonstrated on the Illinois-23 month restriction on switching parties:

"What must also be kept in mind is that voting rights are not absolute and that there is a degree of constitutional infringement short of invidiousness that is permissible so long as the infringement is compelled by a state interest and affects the rights of the voters as little as practicable under the circumstances."

It also noted the temporary nature of the restriction and alternate electoral routes. New York allows an alternate by allowing enrollment before the preceding general election on an unrestricted basis.

The courts in the limited number of sister-states that have considered provisions similar to § 186 have all upheld them. Thus *State v. Felton*, 77 Ohio St. 554, 84 N.E. 85, 89 (1908) upheld a requirement that a voter in a primary must have voted with the political party at the last election. It is not unreasonable to require some prior test of partisanship for eligibility. In *Glenn v. Gnan*, 251 Ky. 3, 64 S.W. 2d 168, 172 (1933) it was said:

"If a voter changes his party affiliations by reregistering following a general election and before the succeeding one, and thereby qualified himself to vote in that primary, it would open the door to the grossest frauds and most extensive abuses resulting in making it possible for a sufficient number of the members of one party to participate in the primary election of the opposing party and to dictate its nominees to be voted for at the following general election, and which result it cannot be contemplated the Legislature intended."

Clearly new registrants are in the same category. And if constitutionally we cannot prevent a new enrollment from taking immediate effect, as petitioners contend, we could not prevent a change of enrollment. This certainly was the effect of the District Court's declaratory judgment.

The same court as in *Glenn* approved the use of a "suspended file" in *Board of Registration Commissioners v. Campbell*, 251 Ky. 597, 65 S.W. 2d 713, 719 (1933).

In *Hennegan v. Geartner*, 186 Md. 551, 47 A. 2d 393 (1946), the state Court of Appeals upheld a statute prohibiting a voter from changing his registration within six months of a primary as against a claim of deprivation of equal protection. The evil of unscrupulous electors hold-

ing themselves out to vote with any party was the evil sought to be avoided. New York also has a vital interest in avoiding this situation.

New York cannot and does not desire to prevent all political shifts, but some curb on violent changes within our traditional parties is vital. It is conjectural to assume, as did the District Court, that there are less drastic means available to achieve the desired end. The availability of penal sanctions is helpful but the delay inherent in the consideration of criminal matters makes the legislative desire to use "the box" a proper exercise of its discretion. See quote from *McDonald v. Board of Election Comm. of Chicago*, 394 U.S. 802, *supra*, pp. 15-17.

POINT III

Election Law § 186 does not unduly burden the exercise of any First Amendment rights.

In finding that the enrollment box system of Election Law § 186 violates rights guaranteed by the First Amendment, the District Court's opinion completely overlooked the case of *Lippitt v. Cipollone*, *supra*, 404 U.S. 1032. Fortunately the Court of Appeals rectified this error. It would seem obvious that if the four year waiting period approved in *Lippitt* does not violate the right of political expression, then the much less severe limitation or "waiting period" contained in § 186 also does not. The right to run for public office involved in *Lippitt* is as fundamental and relevant to free expression as the right to enroll and vote in a party primary.

The *Lippitt* case already has been shown, *supra*, Point I, to approve the compelling state interest test advanced by § 186. "Balancing" or "less drastic means", mentioned by the District Court, are not appropriate. The challenge procedures and criminal sanction, the former being cited in the District Court's opinion (36), are really not "less drastic". Regular recourse to criminal sanctions and court

challenge procedures will, of necessity, in this area of primary voting, have a much more chilling effect on the exercise of First Amendment rights than § 186. Certainly § 186 does not prevent any citizen from speaking out on the issues of the day or affiliating in practice with a political party or group. The limited delay in the effective date of enrollment only protects the stability of political parties, a compelling state interest, and does it, in our view and in the opinion of the Court of Appeals, in a reasonable manner. It said "section 186 is carefully designed to infringe minimally on First and Fourteenth Amendment rights. The statute works indirectly to its end of having only voters in general sympathy with the party vote in that party's primary" (70).

We invite the Court's attention to *Nagler v. Stiles*, — F. Supp. — (D.N.J., May 26, 1972), which struck down a two year restriction on party-switches.* However, *Nagler* noted the New York statute's minimal infringement on constitutional rights. In New York there is no excessively long commitment to a party by voting in its primary. Requiring the voter to choose a party prior to the preceding general election simply forces a voter who wishes to engage in "raiding" to recognize his inconsistency. *Nagler, supra*. This applies to the previously non-affiliated or unregistered voter. If not enrolled when eligible, he can join a party to advance an individual's cause for ulterior motives, while fully intending before the next general election to switch party allegiance, as allowed under § 186, to another party and to vote for the latter's candidates. These debilitating tactics were alluded to in the dissent in *Pontikes v. Kusper, supra*, as follows:

"We should be equally remiss if we were not cognizant of the fact that party allegiances are powerful and can

* This is similar to the *Pontikes* case.

quite easily lead to nefarious inter-party raiding absent any restrictions."

Failure to enroll in a party, as did the petitioners, is as much a political statement of belief as enrolling in a party.

The cases petitioners cite, such as *Pontikes v. Kusper*, *supra*, — F. Supp. — (N.D. Ill., March 9, 1972), *Nagler v. Stiles*, *supra*, — F. Supp. — (D. N.J., May 26, 1972) and *Gordon v. Executive Committee of the Democratic Party of Charleston*, 335 F. Supp. 166 (D. S.C. 1971), are all inapposite. Section 186 exacts no loss of vote if a person switches party allegiance or seeks to change from independent to party status. If the voter changes his enrollment before the preceding general election he votes in the primary of his choice the following year. No one is locked into an unwanted political affiliation. Petitioners' argument (Br. p. 26) that qualified voters should be able to change party allegiance to reflect changes in political climate during the primary campaign runs counter to decisions which see our political parties as voluntary associations of individuals. See *Socialist Labor Party v. Rhodes*, *supra*, and the instant case. Opening party primaries to voters not in sympathy with the party's program and common aims would ultimately lead to its destruction as a viable vehicle for political expression. As the Second Circuit said (68):

"In such circumstances, the raided party would be hard pressed to put forth the candidates its members deemed most satisfactory. In the end, the chief loser would be the public."

Actually the participation of such independent voters or untimely-enrolled voters raises a fundamental danger to the accepted definition of a political party found in the Court of Appeals opinion and in *Socialist Labor Party v. Rhodes*, *supra*. The independent voter may have no real sympathy with the party, as witnessed by his prior failure

to enroll when eligible, but may desire to advance the election of a particular candidate in the primary. Their interest is in the "personality of an individual", not the "basic theories of government" possessed by the true party members. 290 F. Supp. at 988. To protect party integrity New York need not allow such voters to participate in a party primary. Their right to vote finds expression at the general election, not the primary. The petitioners desire to make the primary a general pre-election. This is not its function. If it were, the party system, as we know it in New York, with four recognized parties, would be in serious danger of destruction.

The two recognized minority parties of New York, Conservative and Liberal, have limited enrollments. Were independents to vote in their primaries, they could easily overwhelm those dedicated enrollees who year in and year out form the backbone of these minority parties but are joined at the general election by innumerable other voters who seek an alternative to the major parties.

The massive participation by non-Democrats in the Spring 1972 primaries by means of party-switching is a matter of record in our press. Indeed it led to the adoption at the Democratic National Convention in Miami in July 1972 of a rule requiring closed primaries in the future, with past registration as a Democrat as a requisite for participation. In other words the Democratic Party recognized the necessity of the end § 186 seeks to achieve. Primaries must be limited to party members, and some means must exist to eliminate independents and members of other parties from influencing the party's choice of its candidate.

It is of interest to note that Election Law § 186 did not in any way prevent Mayor John Lindsay of New York City from changing party enrollment to vie for the 1972 Democratic presidential nomination. While his change of enrollment went into the box under § 186 for a limited period,

the statute did not inhibit him, as all the press reports showed, from immediately expressing his views on Democratic Party matters. Honest, trustworthy citizens do not find § 186 a limitation on their freedom of political expression, or in switching party loyalties or affiliations. However, those who have ulterior motives and seek to subvert or destroy the stability of our political party system will find § 186 an obstacle. *Zuckman v. Donahue, supra*, p. 13. It was meant to be and is a constitutional exercise of discretion by our Legislature. See *Lippitt, supra*, and *McDonald v. Board of Election Comm., supra*.

The alleged infringement on petitioners' right of association is amply justified by the fact that newly-enrolled voters can pose a substantial threat of organized large-scale "raiding". In their papers, the petitioners alleged there were hundreds of thousands of persons similarly situated. In this day and age there are many groups, already well organized, with political aims, which, without the deterrent of § 186, could easily engage in raids or short-notice takeovers of established political organizations.

POINT IV

§ 186 is the least drastic means to achieve a compelling state interest, is not a durational residency requirement and is totally nondiscriminatory.

A. The Least Drastic Means

Petitioners argue that New York already has other means to prevent raiding—namely, Election Law § 332. However the Court of Appeals noted (71-72) that in the face of large scale raiding that section would leave party officials virtually impotent. Section 186 is effective but that in no way means it is unconstitutional. Its broad deterrent effect was praised, not condemned by the Court of Appeals.

We have already noted in Point II that regular recourse to criminal sanctions and court challenge procedures, suggested by petitioners, will in the end be more drastic and regularly involve court inquiries into the voters' minds. Section 186 avoids this in most instances, preventing the widespread specter of state-enforced thought control.

B. The Lack of a Durational Residence Issue

The petitioners continue to claim that § 186 is a durational residency requirement and would apply *Dunn v. Blumstein, supra*, 405 U.S. 330, 31 L. Ed. 2d 274 (1972). Simply stated, § 186 cannot be such a requirement because petitioners never lacked residency.* They only failed to avail themselves of the opportunity to timely enroll. Therefore, as to petitioners, there is no issue as to any constitutionally protected right to travel. Indeed the petitioners never raised the issue below and it was not discussed in the several opinions. Where an issue is neither raised before nor considered by the Court of Appeals, this Court will ordinarily not consider it. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 (ftn. 1), 90 S. Ct. 1598 (1970).

Furthermore, this claim of right to travel can only be presented by a possible litigant who is a newly established New York resident or who has crossed county lines within New York since the last general election; the interests of such a class would not be adequately represented by the instant petitioners because, except for subd. 6 to Election Law § 187 (special enrollments), anyone in such a class would be entitled to enrollment up to 30 days before the primary. See Election Law § 187, subd. 2, which allows special enrollments for those who lacked residency requirements for voting at the time of the last general election. Subdivision 6 limits this to the same county as a per-

* Before the *Dunn* decision this claim rested on 42 U.S.C. § 1973aa-1.

son resided in at the time of the last general election. The petitioners do not attack subd. 6 simply because its elimination would not assist them. To this extent the interests of petitioners and new residents or county-movers are antagonistic. Not being either of the latter, petitioners cannot present their claim which, it might be noted, was present in the *Bachrow* case, *supra*.

Section 186 applies across the board to all persons who failed to enroll in a party at the time of the preceding general election. This is in contrast to the *Dunn* situation where only the new resident was prevented from voting in a primary because of the lack of sufficient residence before the election.

C. The Non-discriminatory Nature of § 186

Petitioners' discussion of "grandfather clauses" is inappropriate. Section 186 does not discriminate against 18-21 year olds or racial minorities. On the contrary, it is completely neutral. It has been around much longer than the Twenty-sixth Amendment and clearly was not passed to impair the newly enfranchised's right to vote. So, too, as to racial minorities; and there is no allegation that petitioners are representatives of the class. Even the favorable (to petitioners) decision in the District Court did not think these arguments worthy of mention or discussion. Petitioners have engaged in unsupported speculations, which have no basis in the record. Why persons fail to register or enroll when eligible is always a mystery and to a large measure rests on the lethargy of such individuals, or the instant petitioners, in any particular case. See *Foutham v. McKeithen*, 336 F. Supp. 153, 162 (E.D. La. 1971) app. pdg. 92 S. Ct. 999, 31 L. Ed 2d 279.

The speculative numbers game engaged in by petitioners who claim 950,000 in the 18-21 category at the passage of the Twenty-Sixth Amendment (Brief for Pet. 45) is not relevant to the underlying constitutional issues. The peti-

tioners ignore the extent to which such factors as motivation, disinterest or inertia may be responsible not only for the non-registration of eligibles in the 18-21 age bracket, but in all other age categories. In the former connection we note an article "Teen Vote Registration Lags", New York Post, May 12, 1972, p. 1. The gist of the item is that in spite of massive efforts, registration of teenagers for the primary is lagging far behind expectation.

This situation continues as we get closer to the November 1972 election. See "18-20 Group Lags on Registering to Vote," New York Times, August 13, 1972. Apparently it is not § 186, but apathy, that prevents enrollment in this age group.

Also, as the Court of Appeal noted, "New York does allow post-general election enrollment in certain cases. Section 187 of the Election Law allows late enrollment if, for example, the enrollee came of age after the last general election or if he was ill during the enrollment period. The import of § 187 is that New York is not opposed to later enrollment per se" (72, fn. 5). Thus thousands of persons who attained 18 since the last general election of, 1971 could and did enroll to vote in the June 1972 primary but petitioners ignore this provision.

POINT V

The petitioners have waived their claimed constitutional rights, if any.

Assuming, without conceding, that the petitioners have some constitutional right to enroll in a party and participate in its primary without extended delay in enrollment, the record fails to show that Election Law § 186 prevented them from enrolling in time for the 1972 primary. As is stated in paragraph "6" of the *Rosario* complaint, "[e]ach of these plaintiffs could have registered and enrolled on

or before October 2nd, 1971, the last date of registration for the November 1971 elections. They did not do so." The petitioner in *Eisner* also could have enrolled then (see paragraph "5" of the complaint). As was said in *Matter of Vitale v. Cristenfeld*, New York Law Journal, August 30, 1971, p. 14, col. 3 (Sup. Ct. Nassau Co., 1971); aff'd 37 A.D. 2d 775 (2nd Dept. 1971):

"The petitioner's inability to vote in the [primary] has not been caused by the provision of the Election Law which he assails but by his admitted failure to take timely steps to effect his enrollment."

As in the instant case, the petition was silent as to any reason for the failure to timely enroll. The inference is warranted that petitioners knew they could enroll at the proper time but for undisclosed reasons elected not to do so. To quote *Matter of Davis v. Board of Elections*, 5 N.Y. 2d 66, 69, 153 N.E. 2d 879 (1958), "[t]he franchise conferred by the Constitution gives rise not only to a right but also a duty, and this statute [Election Law § 138] merely attaches reasonable consequences to the nonperformance of that duty in the interest of administrative necessity." In the instant situation we have the compelling state interest of protecting the integrity of political parties.

It should be noted that in any case, "even the most basic constitutional rights may be waived." *Redgate v. Boston Redevelopment Authority*, 311 F. Supp. 43, 47 (D. Mass., three-judge court, 1969). To the extent the instant petitioners failed to timely enroll, in spite of substantial publicity, they should be deemed to have waived their constitutional rights, if any.

The failure of the petitioners to comply with the law also raises questions of justiciability. *Golden v. Zwickler*, 394 U.S. 103 (1969).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated: September 11, 1972.

Respectfully submitted,

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E-COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1371

Supreme Court, U.
FILE

SEP 16 19

MICHAEL RODAK, JR.

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTES-
MAN, individually and on behalf of all others similarly situated,
Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P.
LOMENZO, Secretary of State of The State of New York, MAURICE
J. O'ROURKE, JAMES M. POWER, THOMAS MALLER and J. J.
DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE
CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of
all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P.
LOMENZO, Secretary of State of The State of New York,
WILLIAM D. MEISSER and MARVIN D. CRISTENFELD, Commis-
sioners of Elections for Nassau County,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS
DAVID N. DINKINS AND GUMERSINDO MARTINEZ

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1371

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Petitioners,

—against—

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Respondents.

STEVEN EISNER, on his own behalf and on behalf of
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

DAVID N. DINKINS AND GUMERSINDO MARTINEZ

Section 186 of New York's Election Law Unconstitutionally Impedes Previously Unaffiliated Voters From Affiliating With the Political Party of Their Choice and Participating in Its Primary Election

Respondent, David N. Dinkins, is the duly appointed President of the Board of Elections of the City of New York. Respondent, Gumersindo Martinez, is a duly appointed member of the Board of Elections of the City of New York. This brief is submitted in respondents' respective personal capacities, since the four members of the New York City Board of Elections were equally divided over the authorization of the instant brief.*

Section 186 has the effect of disenfranchising large numbers of New York City residents each year. Thousands of bona fide young voters were excluded from the primary elections held in New York on June 20, 1972 pursuant to Section 186, simply because they failed to enroll in the political party of their choice prior to October 2, 1971. Respondents, charged with the responsibility to oversee the electoral process in New York City, perceive no compelling state interest which is advanced by applying Section 186 to disenfranchise new voters affiliating with a political party for the first time. We see no basis for fearing that new voters affiliating with a political party for the first time present a danger of bad faith raiding. Accordingly, apply-

* At the time the *Rosario* case was commenced, the New York City Board of Elections was comprised of Maurice O'Rourke, James M. Power, Thomas Mallee and J. J. Duberstein. The Board is currently made up of David N. Dinkins, Gumersindo Martinez, William Larkin and J. J. Duberstein. The Board is charged with the responsibility of administering the electoral process in the City of New York.

ing the test mandated by this Court in *Dunn v. Blumstein*, — U.S. —, 31 L. Ed. 2d 274 (1972), respondents join with petitioners in requesting that Section 186 be declared unconstitutionally overbroad.

Moreover, we believe that the summary disenrollment procedures provided by Section 332 of the Election Law coupled with New York's comprehensive criminal sanctions governing election fraud provide adequate safeguards against bad faith raiding. Accordingly, we believe that persons wishing to alter a pre-existing political affiliation should be permitted to do so free from the strictures of Section 186 of the Election Law, since less drastic alternatives exist by which New York could guard against bad faith raiding.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed and Section 186 should be declared unconstitutionally overbroad.

Respectfully submitted,

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FILED

SEP 22 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MICHAEL RODAK, JR., CL

No. 71-1371

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Petitioners,

— against —

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLER and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

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STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

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NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSER and MARVIN D. CRISTENFELD, Commissioners of Elections for Nassau County.

Respondents.

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INDEX

	Page
Statutory Provisions Involved -----	1
Jurisdiction -----	8
Question Presented -----	8
Registration and Enrollment in New York State ----	8
Statement of the Case -----	12
Summary of Argument -----	15
POINT I—Petitioners' standing to challenge delayed enrollment is limited to their factual situation which, in turn, is moot -----	16
POINT II—The petitioners have waived their right to challenge delayed enrollment -----	19
POINT III—The function of delayed enrollment in New York State is essential to the primary election system -----	22
A. Development -----	22
B. The Purpose of Delayed Enrollment -----	24
C. Which is the least drastic alternative? -----	28
POINT IV—Delayed enrollment is constitutional under either the rational basis test or the compelling state interest test -----	32
POINT V—New York's deferred enrollment system is not a "grandfather clause." -----	37
POINT VI—Delayed enrollment does not abridge the right to travel -----	40
Conclusion -----	43

TABLE OF CONTENTS

CITATIONS	
Cases	
	Page
Addabbo v. O'Rourke and Friedman, 27 N.Y. 2d 645, 261 N.E. 2d 904 (1970), appl v dismiss'd sub nom.	
Friedman v. O'Rourke, 400 U.S. 884 (1970)	17, 35
Bachrow v. Rockefeller, 71 C 930 (E.D.N.Y. 9/8/71, 3- judge court)	40
Bender v. Ogilvie, 335 F. Supp. 572 (N.D. Ill. 3-judge court 1971)	25
Bishop v. Rockefeller, 71C 1088 (E.D.N.Y. 9/7/72, 3- judge court)	24
Brady v. United States, 397 U.S. 742 (1970)	22
Bullock v. Carter, 405 U.S. 134 (1972)	32, 33, 35
Carrington v. Nash, 380 U.S. 89 (1965)	32, 33
Dunn v. Blumstein, 405 U.S. 330 (1972)	16, 32, 36, 40
Fidell, et al. v. Board of Elections of the City of New York, 343 F. Supp. 918 (E.D.N.Y. 3-judge court 1972)	13
Greenberg v. Cohen, 175 Misc. 405, 17 N.Y.S. 2d 900 (Sup. Ct. 1940)	29
Grovey v. Townsend, 295 U.S. 45 (1935)	35
Guinn v. United States, 238 U.S. 347 (1915)	38
Hall v. Beale, 398 U.S. 45 (1969)	18
In re Mendelson, 197 Misc. 993 (Sup. Ct. 1950)	29, 30
Irish v. Democratic-Farmer-Labor Party, 287 F. Supp. 794 (D. Minn. 1968), aff'd, 399 F. 2d 119 (8th Cir. 1968)	35
Jordan v. Meisser, 405 U.S. 907, 30 L. ed. 2d 778 (1972)	14, 35, 40, 41
Kramer v. Union Free School District, 395 U.S. 621 (1969)	32, 33, 34
Lake v. Power, 9 A.D. 2d 997, 177 N.Y.S. 2d 899 (2d Dept.), aff'd, 5 N.Y. 2d 755, 153 N.E. 2d 391 (1958)	30

CASES

	Page
Lane v. Wilson, 307 U.S. 268 (1939) -----	38
Lent v. Farrell, 34 A.D. 2d 978, 313 N.Y.S. 2d 965 (2d Dept. 1970) -----	28
Lippitt v. Cipollone, 404 U.S. 1032, aff'g, 337 F. Supp. 572 (N.D. Ill. 3-judge court 1972) -----	25
Matter of Davis v. Board of Elections, 5 N.Y. 2d 66, 153 N.E. 2d 879 (1958) -----	21
Matter of Goldshein v. D'Angelo, 34 2d 991, 313 N.Y.S. 2d 975 (2d Dept), aff'd, 27 N.Y. 2d 658, 261 N.E. 2d 908 (1970) -----	30
Matter of Newkirk, 144 Misc. 765, 259 N.Y. Supp. 434 (Sup. Ct. 1931) -----	29, 31, 36
Matter of Titus, 117 App. Div. 621, 102 N.Y. Supp. 851 (1st Dept. 1907) -----	30
Matter of Werbel v. Gernstein, 191 Misc. 274, 78 N.Y.S. 2d 440 (Sup. Ct. 1940) -----	29
Matter of Zuckman v. Donohue, 191 Misc. 399 (Sup. Ct.), aff'd, 274 App. Div. 216, 80 N.Y.S. 2d 698 (3d Dept.), aff'd Mem., 298 N.Y. 627, 81 N.E. 2d 371 (1948) -----	28
McDonald v. Board of Elections Commissioners of Chicago, 394 U.S. 802 (1969) -----	34, 35
McGowan v. Maryland, 366 U.S. 420 (1961) -----	34
Meyers v. Anderson, 238 U.S. 368 (1915) -----	38
Moore v. Ogilvie, 394 U.S. 814 (1969) -----	18
Nagler v. Stiles, 343 F. Supp. 415 (D.N.J. 1972) -----	25
Nixon v. Condon, 286 U.S. 73 (1932) -----	35
Nixon v. Herndon, 273 U.S. 536 (1927) -----	35
O'Brien v. Brown, 41 U.S.L.W. 4001 (U.S. July 7, 1972) -----	25

Cases

	Page
Oregon v. Mitchell , 400 U.S. 112 (1970) -----	41
Pontikes v. Kusper , F. Supp. (N.D. Ill., March 9, 1972) -----	25
Ray v. Blair , 343 U.S. 214 (1952) -----	35
Rhatigan v. Power , 282 App. Div. 838, 123 N.Y.S. 2d 759 (2d Dept. 1953) -----	30
Rosario, et al. v. Rockefeller , 458 F. 2d 649 (1962) --	8, 41
Rogoff, et al. v. O'Rourke, et al. , 29 N.Y. 2d 664, 274 N.E. 2d 444 (1971) -----	16
Scarfone v. Ruggiero , 197 Misc. 1007, 100 N.Y.S. 2d 2 (Sup. Ct.), 277 App. Div. 931, aff'd, 301 N.Y. 662, 94 N.E. 2d 253 (1950) -----	30
Shapiro v. Thompson , 394 U.S. 618 (1969) -----	16, 40
Smith v. Allwright , 321 U.S. 649 (1944) -----	35
Socialist Labor Party, et al. v. Gilligan , U.S. 32 L. ed. 2d 317 (1972) -----	17
Sullivan v. Power , 24 A.D. 2d 709, 262 N.Y.S. 2d 794 (1st Dept.), aff'd, 16 N.Y. 2d 854, 210 N.E. 2d 652 (1965) -----	30
Swift & Co. v. Wickham , 382 U.S. 111 (1965) -----	31
Tenzer v. Meisser , Sup. Ct. Nassau Co., Index No. 6852/70, aff'd, 35 A.D. 2d 670, 315 N.Y.S. 2d 809 (2d Dept. 1970) -----	27
Terry v. Adams , 345 U.S. 461 (1953) -----	35
United States v. Classic , 313 U.S. 299 (1941) -----	35
United States v. State of Louisiana , 380 U.S. 145 (1968) -----	38
Vann & Duberstein , 30 N.Y. 873, aff'g, 39 A.D. 2d 930 (2d Dept. 1972) -----	14

Statutes Cited

Page

Election Law of New York:

§2 (4) ----- 9

117-a ----- 9

131 ----- 22

132 ----- 22

135 ----- 12, 17

136 ----- 12, 17, 22

137 -----

138 ----- 12, 21

146 ----- 22

148 ----- 27

149 ----- 30

174 ----- 9

186 ----- 1, 10, 12, 14, 16, 17, 21, 32, 35, 40

187 ----- 2, 10, 12, 16, 40

330 ----- 30

332 ----- 25, 28, 29, 30, 31

350 ----- 9, 37

352 ----- 9, 37

355 ----- 9

365-368 ----- 9

386 ----- 16

388 ----- 10

394 ----- 20

399 ----- 20

405 ----- 20

Federal Rules of Civil Procedure

23 ----- 13, 15

Statutes Cited

	Page
New York Laws of 1898, ch. 179 -----	22, 23
1899, ch. 473 -----	23
1904, ch. 350 -----	23
1905, ch. 111 -----	23
1905, ch. 674 -----	23
1911, ch. 891 -----	22, 23
1928, ch. 815 -----	24
28. U.S.C. 1254 -----	8
42 U.S.C. §1973 -----	38
42 U.S.C. §1973aa(1) -----	

Miscellaneous

25 Am. Jur. 2d <i>Elections</i> §49 (1966) -----	35
<i>Annual Report of the Board of Elections, County of Nassau</i> (1970) -----	26
Note, <i>Bode v. National Democratic Party, Apportionment of Delegates to National Political Conventions</i> , 85 Harv. L. Rev. 1460, 1470 -----	25
<i>Hearings Before the Committee on Post Office and Civil Service Vote Registration</i> , 92nd Cong., 1st sess. on S. 1199, S. 2445, S. 2437 and S. 2574 (1971), 267 -----	20
V.O. Key, <i>Politics, Parties and Pressure Groups</i> , 5th ed., 1964 -----	12, 19, 39
Leiserson, <i>Parties and Politics</i> , 1958 -----	39
New York Post, 7/12/72, 27 -----	34
328 Ops. Atty. Gen. 1915 (New York) -----	23
Stern and Gressman, <i>Supreme Court Practice</i> , 4th ed., 1969, §5.18 at 233 -----	40

IN THE

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OCTOBER TERM, 1971

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Petitioners,

— *against* —

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Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

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Respondents.

BRIEF FOR RESPONDENTS, WILLIAM D. MEISSER AND MARVIN D. CRISTENFELD, COMMISSIONERS OF ELECTIONS FOR NASSAU COUNTY, NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statutory Provisions Involved

NEW YORK STATE ELECTION LAW §186 & §187.

§186. Opening of enrollment box and completion of enrollment.

All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened

nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers, to the effect that it has correctly and properly transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first day of February in each year.

§187. Application for special enrollment, transfer or correction of enrollment. 1. At any time after January first and before the thirtieth day preceding the next fall primary, except during the thirty days preceding a spring primary, and except on the day of a primary, a voter may

enroll with a party, transfer his enrollment after moving within a county, and under certain circumstances, correct his enrollment, as hereinafter in this section provided.

2. A voter may enroll with a party if he did not enroll on the day of the annual enrollment (a) because he became of age after the preceding general election, or (b) because he was naturalized subsequent to ninety days prior to the preceding general election, or (c) because he did not have the necessary residential qualifications as provided by section one hundred fifty, to enable him to enroll in the preceding year, or (d) because of being or having been at all previous times for enrollment a member of the armed forces of the United States as defined in section three hundred three, or (e) because of being the spouse, child or parent of such member of the armed forces and being absent from his or her county of residence at all previous times for enrollment by reason of accompanying or being with such member of the armed forces, or (f) because he was an inmate or patient of a veterans' bureau hospital located outside the state of New York at all previous times for enrollment, or the spouse, parents or child of such inmate or patient accompanying or being with such inmate or patient at such times, or (g) because he was incapacitated by illness during the previous enrollment period thereby preventing him from enrolling.

3. A voter so desiring to enroll shall file, within the times specified in subdivision one of this section, with the board of elections of the county in which he resides, his affidavit setting forth substantially the following: the county and the city or town in which he resides, the election district, the ward or assembly district, if any, and the street and number, if any, of such residence; a statement that he is, or will be, a qualified voter of the election district stated at the next general election; the name of the party with which he desires to enroll and a statement that he is in general sympathy with its principles and intends to support generally its nominees at such elections;

a statement that he is not enrolled and the reason therefor which shall be one of those set forth in clauses (a), (b), (c), (d), (e), (f) or (g) of subdivision two. A voter desiring so to enroll whose status falls into any of the classifications set forth in any of such clauses, except those in clauses (d), (e) and (f), shall file his affidavit in person.

4. A voter desiring so to enroll who is a new voter as defined in section one hundred fifty, shall, additionally, produce proof of literacy as provided in section one hundred sixty-eight.

5. If the voter applies for special enrollment under the classification set forth in clause (b) of subdivision two, his naturalization papers or a certified copy thereof shall be submitted to the board for inspection and his affidavit shall contain a statement that the deponent is the person named in the paper so submitted.

6. Special enrollment under the classification set forth in clause (c) of subdivision two is hereby expressly limited to a voter otherwise qualified, who did not have the qualifications to vote at the previous general election and such special enrollment is restricted to the same county the voter resided in at the preceding year.

7. If the voter applies for special enrollment under the classification set forth in clause (g) of subdivision two, he shall file an additional affidavit setting forth the following: a statement that he was incapacitated by illness; the nature and times of which shall be stated in an affidavit of a duly licensed physician or in a certificate from the superintendent or other person in charge of a hospital, from registering for the preceding general election in respect to a personal registration district, or from voting at the preceding general election in respect to a non-personal registration district.

8. If, after being regularly enrolled in an election district as a member of a party pursuant to the provisions of subdivision five of section one hundred fifty-four, or subdivision six of section one hundred fifty-five, or section one hundred seventy-three or section two hundred three, or section three hundred three, a voter shall move into another election district of the same county, city or village, he may have his enrollment transferred to such new district, as a member of the same party, by filing with the board of elections within the times specified in subdivision one of this section, his affidavit showing the name of the party with which he is enrolled, and the town or city, election district, and when required, the ward or assembly district, in which he is enrolled, the street address, if any, from which he was enrolled, the town or city, election district, and when required, the ward or assembly district thereof into which he has moved and the street address, if any, of his residence therein, stating that he resides in the last mentioned place and desires to have his enrollment with such party transferred thereto.

9. In a city of one hundred seventy-five thousand inhabitants or more, the voter must appear and file his affidavit in person and also answer such questions affecting his identity as the board may deem necessary. In such a case the board shall compare the voter's signature, if any, on the affidavit, with his signature on the register, or if he be unable to write, shall submit to him the questions required for an identification statement on a day of registration, and, in the city of New York shall have his answers written down in the book for identification statements for the election district of his new residence. In the city of New York, the voter, if able to write, shall sign his name in the appropriate column of the signature copy of the register to which he has moved.

10. In any case not hereinbefore in subdivisions eight and nine provided for, the board in its discretion, may require a voter applying for such transfer to appear in person and answer questions affecting his identity.

11. Such transfer of the enrollment of any voter in any year shall be made but once in such year.

12. If, after being regularly enrolled in an election district as a member of a party pursuant to the provisions of subdivision five of section one hundred fifty-four, or subdivision six of section one hundred fifty-five, or section one hundred seventy-three, or section two hundred three, or section three hundred three, a voter discovers he has made a mistake when enrolling, he may apply within the times specified in subdivision one of this section, to the board of elections of the county in which he resides, for a correction of the mistake made by him when marking his enrollment blank, by filing his affidavit setting forth substantially as follows: the name of the party with which he is enrolled, and the town or city, election district, and when required, the ward or assembly district, in which he is enrolled, the street address, if any, from which he was enrolled, a statement, substance, that his current enrollment blank was cross marked X in a circle under the name and emblem of a party but that such marking was done by mistake and that he did not intend to enroll with that party; the name of the party with which he did intend to enroll and which he desires to be substituted on the register for the one opposite his name; a statement that he has been duly and regularly enrolled with the party whose name he desires substituted for at least five years immediately preceding the enrollment at which such mistake occurred, specifying the county or counties and the addresses at which he resided where he was enrolled; that he is in general sympathy with the principles of the party with which he requests to be enrolled and intends

to support generally its nominees at the next primary and general election, and that he has not participated in any primary election or convention of any party other than with which he requests to be enrolled during such period of five years, or since. If, for any such period, the registers or enrollment books in the office, of such board do not show the applicant to have been enrolled therein with the party with which the applicant requests to be enrolled, the board shall require the applicant to produce a certified transcript of his enrollment with such party elsewhere within the state accompanied with proof, by affidavit, showing his identity with the person whose name appears in such transcript.

13. Except where a voter is expressly required under subdivisions two, three, four, five, six, seven, eight, nine, ten or twelve of this section to file his affidavit in person or to appear in person, his affidavit required under any of such subdivisions may be filed either in person or by agent or sent by mail. Mailing within the state and within the times prescribed for filing shall be sufficient, if the affidavit be received by the board. The postmark shall be sufficient proof of the date of mailing. If mailed outside of the state, the affidavit must be received by the board within the times so prescribed for filing.

14. The board shall prepare forms for the various affidavits required under this section and, upon application, shall furnish a copy of the appropriate form to or for any voter desiring to use the same, and an additional copy if required. Copies also may be sold by the board, at cost, to any qualified voter.

**Brief For Respondents, William D. Meisser and
Marvin D. Cristenfeld, Commissioners of Elections
For Nassau County, New York**

The decision of the United States District Court for the Eastern District, Chief Judge Jacob Mishler presiding, has not yet been officially reported; it is reproduced in the Appendix at 21-45. The denial, by Chief Judge Mishler, of the respondents' application for reargument has not been officially reported. It is reproduced in the Appendix at 49-56. The reversal of the District Court's decision by the United States Court of Appeals for the Second Circuit is reported as *Rosario et al. v. Rockefeller, et al.*, 458 F. 2d 649. It is also reproduced in the Appendix at 69-73.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

Do the New York State's political party enrollment statutes unconstitutionally abridge the petitioners' right to vote in a primary election?

Registration and Enrollment in New York State

The issue before this Court concerns the question of what requirements may be set for an individual who wishes to enroll in a political party. Under New York's system of permanent personal registration and enrollment, New York residents follow two separate and distinct procedures for registration and for enrollment; there being as a prerequisite for enrollment the requirement that an individual be registered to vote. New York has adopted as of 1967,

permanent personal registration, Election Law §350. Under this system an individual, once he has registered, keeps such registration effective so long as he votes in the general election at least once every two years. Election Law §352.

Registration is available via three methods:

(1) Central registration (Election Law §355), which is available at the Central Board of Elections during regular office hours for approximately nine months every year.

(2) Local Registration Law (§§365-368,) which provides the opportunity to register, at each polling place throughout the County, on at least two days each year and on four days during Presidential years.

(3) Absentee registration (Election Law §117-a.) which allows an individual, who expects to be absent from the County on Local Registration days, to register to vote up to 30 days prior to the general election, via the United States mails.

Enrollment in a political party occurs after an individual has registered to vote. He must complete a party enrollment blank (Election Law §174); entering on it his choice of the political party with which he wishes to affiliate himself by "solemnly declaring" himself to be "in general sympathy with the principles of the party" which he has designated. A political party is defined as "any political organization which at the last preceding election for governor polled at least fifty thousand votes for governor." (Election Law §2(4)). New York State has four political parties under this statute: Conservative, Democratic, Liberal and Republican. An individual may decline to enroll in a political party and he will thereafter be listed as "blank". Once an individual has completed his enroll-

ment blank, such blank is ordinarily placed in a sealed box and not opened until the Tuesday following the next general election (Election Law §186). This process is known as "delayed" or "deferred" enrollment. An individual does not become officially affiliated with a party, however, until his name is formally entered on the enrollment book; since, however, such listing must be completed by the following February 1st, there is no impediment to the individual by said listing as no activities requiring party enrollment take place during such time.

This system has exceptions to the principle of delayed enrollment. These exceptions, known as special enrollment (Election Law §§187, 388), are designed to allow the immediate full participation in party affairs to certain classes. A person is eligible for special enrollment upon:

1. Attaining voting age after the preceding general election.
2. Becoming a naturalized citizen by ninety (90) days prior to the preceding general election.
3. Being a member of (or a spouse, child or parent residing with an individual who is a member of) the armed forces at all previous times to enrollment.
4. Being an inmate or patient of a veterans hospital located outside of New York, or a spouse, child or parent accompanying such patient.
5. Being physically incapacitated during the previous enrollment period.
6. Not having the necessary residential qualifications for enrollment in the preceding year—such qualifications being: a resident of the State and of the County, City or Village for three months next preceding an election. This last provision is limited to those who had resided during the preceding year within the same county in which they now desire to enroll.

(Summary of Election Law §187, §388).

Throughout 1971, a period when each of the petitioners, Pedro J. Rosario, William J. Freedman, Karen Lee Gottesman and Steve Eisner, first became eligible to vote, special enrollment was available to them*. Each petitioner, therefore, could have easily availed himself or herself of this opportunity and as a result would have been eligible for participation in the June 1972 primary. It should be noted that an individual does not have to be of voting age at the time of registration — rather, he merely must demonstrate that he will be of voting age on Election Day, so that each petitioner could have registered.

In 1971, Nassau County began the year with 635,390 registered voters. During the year 54,141 individuals registered via central registration, 32,669 of whom were eligible for special enrollment. The remaining 21,472 fell under the operation of delayed enrollment. Following the September 14, 1971 primary election, 47,219 persons registered to vote on the three days of local registration. Since this was the post-primary period, there was no need by any of these 47,219 persons to enroll in a political party. During 1971, therefore, only 21,472 individuals were directly affected by delayed enrollment out of a total of 736,750 voters who ultimately completed the process of registering and enrolling to vote during 1971.

The foregoing statistics also demonstrate that over 100,000 Nassau County voters registered for the first time during 1971 in Nassau County (54,141 voters during central registration and 47,219 voters during local registration). If petitioner Eisner had joined his over 100,000 fellow Nassau County residents in registering and enrolling during 1971, he would not have been barred, by delayed enrollment, from voting in the June 1972 primary election.

*Special enrollment was available to every individual in New York State who was eighteen, nineteen, twenty or twenty-one during 1971, because of the passage of the Twenty-Sixth Amendment to the United States Constitution, thus each of these three age groups attained voting age after the preceding general election.

Statement of the Case

The petitioners seek to challenge New York State's closed primary election system. A closed primary is one in which only the *bona fide* members of a political party may participate in that party's primary election.*

New York State utilizes the method of delayed enrollment in that a person who enrolls must wait until after the next general election for such enrollment to become effective, Election Law §186. If, however, a person is eligible for special enrollment, Election Law §187, the person's enrollment is effective immediately.

Enrollment in a political party is a qualification in order to: vote in a party's primary election; sign, and to be a subscribing witness to, designating petitions which place a candidate on the primary election ballot, Election Law §§135, 136; enrollment is also a qualification for most candidates in a party primary election, Election Law §137. This latter qualification can be waived, Election Law §137(4). (Candidates not only appear on the general election ballot by winning a party's nomination at a primary election, but candidates may also appear on the general election ballot by the means of independent nominating petitions, Election Law §138).

Petitioners are duly registered voters in New York State and they registered after the 1971 general election when registration reopened on December 1, 1971. They also enrolled at that time and then completed enrollment blanks which were deposited in a sealed box pursuant to Section 186. Each petitioner could have registered and enrolled prior to the 1971 general election so that they would have

*The methods of determining party membership vary from state to state, see V.O. Key, *Politics, Parties and Pressure Groups*, 5th Ed. (1964) 389-392.

been eligible to vote in the 1972 New York State Primary Election. Three days after the *Rosario* petitioners registered, they filed their complaint herein and two days after petitioner *Eisner* registered, he filed his complaint.

This action was originally sought to (a) convene a three judge District Court, (b) declare Section 186 of the Election Law unconstitutional, and (c) grant plaintiffs (petitioners herein) appropriate equitable relief. *Rosario* complaint, Append. 6; *Eisner* complaint, Append. 10-11. A claim was also made in regard to the unconstitutionality of New York State's absentee ballot procedure, because it did not apply to primary elections. This latter claim was formally dropped, as it was the sole issue in another case in the Eastern District, N.Y. *Fidell v. Board of Elections of the City of New York*, 71C 1577—(three-Judge Court.) On the return date of the motions in the District Court on December 17, 1971, the petitioners dropped their request for injunctive relief and agreed that the action would be "solely one for declaratory judgment." *Decision and Order of the District Court*, Append. 50-51.

The class action aspect of this case is ambiguous. No claim for class action relief was present in the *Eisner* complaint, although the *Rosario* complaint did, but the relief for such request was never pressed. Moreover, no evidence was submitted to the District Court to support a finding that *Rosario* was a class action under Rule 23 of the Federal Rules of Civil Procedure. Nor was such a determination by order made as is required by Rule 23(c). Judge Mishler began his opinion, however, by stating:

"Plaintiffs in these class actions [*sic*] represent voters who were qualified to register to vote and to enroll in a political party on or before November 2, 1971, the date of the last general election. They failed to do so." Append. 22.

This latter statement served only to confuse the scope of Judge Mishler's decision inasmuch as it does not include newly arrived residents of New York State (see *Jordan v. Meisser*, 405 U.S. 907, 30 L. Ed 778), nor does the statement include voters who were already enrolled but who desired to switch their party enrollment. Yet Judge Mishler concluded his opinion by granting judgment in favor of the plaintiffs and declaring §186 unconstitutional without any qualifications. The Court of Appeals did not go into the class action question as their decision upheld §186's constitutionality.

On February 10, 1972 Judge Mishler handed down his opinion, which declared that Section 186 of the New York State Election Law was unconstitutional. (App. 21-45)

On February 22, 1972 a stay was granted by the Second Circuit and argument on the expedited appeal was set for February 24.

On April 7, 1972, the panel of the Second Circuit, which consisted of Judges Lumbard, Mansfield and Muligan reversed the District Court and ruled that Section 186 was constitutional. (App. 64-73) Petitioners' application for a rehearing *in banc* was denied April 24, 1972 with Judges Oakes, Feinberg dissenting. On April 26, 1972 Mr. Justice Marshall granted a temporary stay pending consideration by the full Court.

On May 30, 1972 the petition for writ of certiorari was granted and the motion for summary reversal was denied; a motion for expedited relief was denied with Mr. Justice Stewart dissenting and the application for a stay was denied with Justices Douglas, Brennan, Stewart and Marshall dissenting.*

*The New York Court of Appeals last considered the constitutionality of Section 186 on June 14, 1972, in *Vann v. Duberstein*, 30 N.Y. 873, which affirmed the decision of the Appellate Division, of the Supreme Court, 39 A.D. 2d 930 (2nd Dept.) The Court affirmed for the reasons stated in the United States Court of Appeals decision herein.

Summary of Argument

Petitioners lack standing to challenge all aspects of delayed enrollment. No proper finding of class representation was ever made pursuant to Federal Rule of Civil Procedure 23(c). For the aspects of delayed enrollment which petitioners can challenge, the matter is moot.

The petitioners had sufficient opportunity during 1971 to enroll but failed to do so; they have lost their right to challenge delayed enrollment.

The predominant method of nominating a candidate for general office in New York State is the primary election. To insure that only *bona fide* political party members participate in that party's primary, delayed enrollment has been a longstanding requirement. Due to the current existence of a four party system in New York, there is a continued need for delayed enrollment to maintain the integrity of the two minor parties. A suggested alternative to delayed enrollment proves, upon analysis, to be a harsh and questionable alternative.

Under any constitutional test, delayed enrollment is valid although the compelling state interest test should not be applied since it has never been used in determining a primary election case.

Delayed enrollment does not require previous participation in any election, nor has it been proved that delayed enrollment has a disproportionate effect on any class or group. The concept of a "grandfather clause" is, therefore, not applicable.

The petitioners do not factually present the issue of the right to travel. Delayed enrollment, moreover, is different from previous right to travel cases in that it focuses on the passage of an event (a general election) rather than on a fixed time period (waiting period).

POINT I

Petitioner's standing to challenge delayed enrollment is limited to their factual situation, which in turn is moot.

The petitioners, in seeking to have Section 186 of New York State's Election Law declared unconstitutional *in toto*, go far beyond the manner in which Section 186 affects them. The claim is made that petitioners represent "newly enfranchised voters", yet this could not be correct as individuals in New York State who have attained voting age since the last general election are eligible for special enrollment (Election Law §187(2)).

Nor is the petitioner's right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blustein*, 405 U.S. 330 (1972) affected by Section 186. Although delayed enrollment applies to recently arrived residents of New York State, none of the petitioners falls in that category (indeed no such claim is even made, Petitioners Brief, 8 n. 4).

Having been New York State residents for the entire period relevant to this case (petitioner Eisner has resided in New York for at least 15 years), no infringement on any petitioner's right to travel has been presented to this Court.

No claim is made that petitioners either have moved from one county to another county within New York State or between New York City and another New York county—moves which would bring them under the aegis of delayed enrollment for the purposes of voting or being a candidate in a primary.* See *Rogoff, et al v. O'Rourke, et al*, 29 N.Y. 2d 664 (1971) (allowed inter-county migrants

*Intra-county migrants are allowed to transfer their enrollments, Election Law §386, or to specially enroll, Election Law §187 2 (c) §6.

to be the subscribing witness to designating petitions which are circulated to place a candidate on the primary election ballot, Election Law §§135, 136). Nor do petitioners fall in the class of individuals who seek re-enrollment, because after having changed residences, they had failed to transfer their enrollment, see *Addabbo v. O'Rourke and Friedman*, 27 N.Y. 2d 645 (1970), *app'l dismd sub nom. Friedman v. O'Rourke*, 400 U.S. 884 (1970).

Finally petitioners do not claim that they have attempted to change their enrollment from one party to another.

Assuming that the procedural and evidentiary objections to the class action aspect are suspended for the moment, the petitioners still cannot, logically, represent a class to which they do not belong. The previous discussion demonstrates the various effects which §186 has upon different groups of New York State residents; petitioners simply have not experienced such effects.

From this discussion of non-representation, it can be seen that there are many effects of delayed enrollment which are not presented to this Court. For such issues, it has been recently said:

"This Court recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in *cleancut and concrete form*'. . . Problems of prematurity and *abstractness* may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present."

Socialist Labor Party, et al v. Gilligan, U.S. 32 L. Ed. 2d 317, 321-322 (Cases cited omitted). (Emphasis added), (1972).

Consideration of delayed enrollment should be limited to the factual situation presented to this Court.

In regard to the class in which the petitioners are situated, namely, those who were eligible for special enrollment but who waived such right, the issue is now moot. The completed enrollment blanks of the petitioner were removed from the sealed box on November 14, 1972* and they are now entitled to full participation in their political party's primaries:

"The case has therefore lost its character of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969)

And even *Moore v. Ogilvie*, 394 U.S. 814 (1969), does not allow a case of this nature to be heard ("the problem is therefore capable of repetition, yet evading review", 394 U.S. at 816) since *Moore* was also heard for a second reason. The Court determined that there was a "continuing controversy in the Federal-State area where our 'one-man, one vote' decisions have thrust" (at 816.) These *two* reasons are not present in the instant case. And in *Moore*, the same restriction which adversely affected the appellant originally was capable of affecting him again, *Hall v. Beals*, *supra*, 49. Here, instead, petitioners will not be barred from future participation in a political party. (But see *Dunn*, *supra*, 332, n. 2.)

*In fact, once the June, 1972 primary occurred, the petitioners had experienced §186's full effect. There would be no need for party enrollment until the 1973 primary, thus the mechanics of opening the "box" have no actual effect on the eligibility of the petitioners.

POINT II

The Petitioners have waived their right to challenge delayed enrollment.

Prior to the enactment of Permanent Personal Registration (PPR), New York had employed an annual registration system in that all individuals, in order to be able to vote at the general election and to be able to vote at the primary succeeding the general election, were required to register anew each year. Two main criticisms were leveled at this system. First of all, there was enormous inconvenience to a voter who had to duplicate his efforts each year merely to cast his vote. Secondly, there was overwhelming work for a Board of Elections. Under a system of annual registration (which had been used in over half of the election districts in upstate New York) often there was insufficient time to complete an updated voter list. Under such system, "In 1950, registration in 10 of the 57 upstate counties of New York exceeded the number of citizens 21 and over as reported by the census. In another 11 counties, registrants numbered between 90 and 100% of the citizenry of voting age." V.O. Key, *Politics, Parties and Pressure Groups*, 5th ed., 1964, 629, n. 7.

New York adopted the reform of PPR in 1967. The driving idea behind the change was that it is the voter who would benefit from a registration system and an enrollment system which would make it easier for a voter to register and remain so registered and to enroll and to remain so enrolled. Under this system, an individual's opportunity to participate in an election was greatly increased. Moreover, there was more time for election officials to complete the checking and purging provisions of the Election Law in order to prevent any abuses which might occur. Even now, however, new registrations pres-

ent a formidable work load for a Board of Elections. For instance, Nassau County had over 100,000 new registrations in 1971.

Under Permanent Personal Registration, with voters remaining on the books from year to year, election officials are better able to purify registration lists. This can be accomplished in a number of ways. First, there is the annual postcard check, Election Law §394. This section requires the Board of Elections to send a postcard with voting and polling place information to each listed voter. Whenever a card, that has been mailed to a registered voter, is returned to the Board of Elections as undeliverable, then the Board must cancel forthwith the registration and the enrollment of the individual whose name appeared on the card, Election Law §394(3).

The ability of the Board of Elections to utilize the police investigation, Election Law §399, is also strengthened under Permanent Personal Registration, simply since there is more time available to carry out this task.

Finally, the failure to vote in a two-year period results in a purge of a voter from the registration and the enrollment lists, Election Law §405, thus dropping voters who have died or have moved elsewhere. (In no instance, however, do these processes cut down the possibility of fraudulent enrollment.)

Permanent Personal Registration, therefore, constitutes a reform over the previous method of registration. So long as the system of voter registration in the United States places the duty to register upon an individual (as opposed to certain other countries where the task of registering is left to the government, i.e. Canada and Great Britain, *Hearings before the Committee on Post Office and Civil Service, Voter Registration*, 92nd Cong., 1st sess. on S.1199, S.2445, S.2437, and S.2574

(1971), 267), there is going to have to be effort by the voter to register and to enroll; and there is going to have to be a mechanism whereby fraud and irregularities can be systematically forestalled on an overall basis (as opposed to an individual, case by case basis). Permanent Personal Registration is such a mechanism for registering voters for a general election and delayed enrollment is such a mechanism for enrolling voters for a primary election.

Petitioners herein were eligible to register and to enroll for almost 9 months in 1971, either by personally appearing at Local or Central registration or absentee registration. Such was the finding of Judge Mishler in the District Court, Opinion, Append. 22. For some reason, which has never been explained, the petitioners passed up their opportunity to register and to enroll in 1971.* New York State under permanent personal registration, provided petitioners with more than sufficient time to register and to enroll.

It can only be said, therefore, that the petitioners have waived their right to challenge delayed enrollment as set forth in section 186.

The New York Court of Appeals has stated in regard to a similar challenge to the duty imposed by the State's Election Law that:

"The franchise conferred by the [N.Y.] Constitution gives rise not only to a right but also a duty, and this statute [Election Law §138] merely attaches reasonable consequences to the non-performance of that duty in the interest of administrative necessity." *Matter of Davis v. Board of Elections*, 5 N.Y. 2d 66,69 (1958).

*Not only would the petitioners have been eligible for the 1972 primary but, as they were eligible for special enrollment in 1971, they could have, if they had timely registered and enrolled, participated in the September 14, 1971, primary.

In the face of this established duty, the petitioners offered no reason in the courts below as to why they failed to exercise the duty imposed upon them by the statutes to timely enroll. From this silence, there can be an inference, if not an absolute conclusion, that their admitted failure to enroll during 1971 was a knowing waiver of their right to become eligible for the June 1972 primary election. This "knowing, intelligent" waiver of the right to enroll now bars petitioners from asserting that their constitutional privileges have been abridged. *Brady v. United States*, 397 U.S. 742,748 (1970).

POINT III

The Function of Delayed Enrollment in New York State is essential to the Primary Election System.

A. Development

Prior to use of primary elections, a political party utilized committees, conventions or caucuses to select its nominees for office in a general election. Although New York State still utilizes committees (Election Law §131[1]), conventions (Election Law §132) and caucuses (Election Law §146), the predominant method of nominating party candidates is by direct primaries (Election Law §136[6]).

Only those who are enrolled members of a political party may vote at that party's primary (Election Law §131).

In 1898, the first comprehensive primary statute was enacted (Law of March 29, 1898, ch. 179 [1898], N.Y. Laws 331-359), although this was limited to certain offices and geographical areas. In 1911, a modern direct primary statute was enacted (Law of October 18, 1911, ch. 891 [1911], N.Y. Laws 2657-2726).

The qualifications for party enrollment were set forth in the 1898 law in almost the identical fashion as are the present qualifications (Laws of 1898, *supra*, ch. 179, §3). An individual's opportunity to register and enroll was different, however, since the annual registration could occur each year on only four days ("meetings") every fall (the equivalent of the current "local registration days"), while enrollment could occur on the four registration days or, initially, during certain supplemental periods*.

When the first comprehensive primary law was enacted in 1911, it stated:

"§19. No voter who has once enrolled in a political party shall be permitted to enroll in another political party before the first day of the next registration." L. 1911, ch. 891.

Supplemental and special enrollments were abolished by the 1911 law although special enrollment provisions were added gradually over the succeeding years.

When enacted, the original delayed enrollment constituted a high hurdle for those seeking both to register and to enroll. Registration days were limited to four, whereas

*In the 1898 law, the supplemental period for special enrollment consisted of the month of December and the second Tuesday of May, but only for previously registered, non-enrolled voters and for those who had come of age. In 1899 (Law of May 2, 1899, ch. 473, N.Y. Laws 968-998), this was broadened to June and May of each year, together with February in a presidential year. However, the proviso was added that "no elector who has once enrolled in a political party shall be permitted to enroll in another political party before the first of the next four days of registration." §3(9).

Presumably, certain enrollment abuses began to occur as the Laws of 1904, ch. 350, provided judicial procedures to cancel enrollments because of false declarations, death or change in residency. This law applied only to New York City. In 1905 (Laws of 1905, ch. 111), the special enrollment periods of May and June were ended in New York City; and for second-class cities, the same was done in Laws of 1905, ch. 674.

By 1911, no special enrollment time periods remained, but in the next few years certain ones were restored. See 1915 Op. Atty Gen. 328.

now we have both local registration and central registration (which was begun in 1928 for 2½ months per year ([Laws of 1928, ch. 815])). Central registration was gradually extended so that now it is available from 30 days after a general election and continues until the September 1st preceding the next general election, except for 10 days prior to and 5 days after a primary election.*

Delayed enrollment, when enacted, presented another hurdle in that *annual* registration and enrollment for each and every voter was required. Now, of course, New York has universal Permanent Personal Registration, so that the only effort required of an individual, once he has initially registered and enrolled, is to vote once every two years.

B. The Purpose of Delayed Enrollment

New York's procedure for delayed enrollment prevents a politician from trying to "successfully urge his constituents to vote for him or his party in the upcoming general election, while at the same time urging a cross-over enrollment for the purposes of upsetting the opposite party's primary." *Opinion of the 2d Circuit*, Append. 70. Allowing enrollment during any period after the general election would, however, permit such raiding as voters would not be asked to do two contradictory things at once. Prevention of party raiding enables members of one party to feel assured that their nominee will truly represent the electoral consensus of all that party's members. Prevention of party raiding prevents another party from seeking to assure the nomination of a weak candidate who can be defeated in a general election. Delayed enrollment also allows a maintenance of orientation which differentiates between the two parties. One commentator has suggested that politi-

*By *Bishop v Rockefeller*, No. 71C 1088 (E.D. N.Y. 3-judge court 9/7/72, involving both the Nassau County Board of Elections and the New York Attorney General, central registration is to remain open until September 23, 1972, for 4 business days per week.

cal parties should not only have some discretion in order to determine how their convention delegates will be apportioned, see: *O'Brien v. Brown*, 41 U.S. L.W. 4001 (U.S. July 7, 1972) but that they should also have some discretion to determine who may participate in their processes.* This is done in New York by delayed enrollment.

The New York system of delayed enrollment is dependent upon events, i.e. the occurrence of a general election, rather than on a fixed time period, e.g., a two-year wait. It also sets the minimum number of events which must occur, i.e., only one primary. New York's statute thus presents far less of a resulting time period than the 4 years which have been upheld by this Court in *Lippitt v. Cipollone*, 404 U.S. 1032, *aff'g*, 337 F. Supp. 1405 (N.D. Ohio 3-judge court 1972); or the two years set forth by Illinois (*Bender v. Ogilvie*, 335 F. Supp. 572 [N.D. Ill. 3-judge court 1971]); *Pontikes v. Kusper* — F. Supp. — (N.D. Ill., 3/9/72); or the two successive primaries which are required in New Jersey (*Nagler v. Stiles*, 343 F. Supp. 415 [D.N.J. 1972]).

New York State does not desire to prevent party membership changes since that is a most legitimate goal for a citizen to have; yet there is a compelling need to have this done in an orderly manner. The alternative cited by the petitioners will be shown to be no alternative at all. The petitioners, furthermore, have not suggested any alternatives besides the use of Election Law procedure §332. The removal of the right of New York State to have delayed enrollment would have a deleterious effect on the vigorous 4-party system which the state now enjoys.

There is strong motivation currently for party raiding to occur in the State of New York. The nomination of the minor parties at times serves as the vehicle to

*See Note, *Bode v. National Democratic Party. Apportionment of Delegates to National Political Conventions*, 85 Harv. L. Rev. 1460, 1470.

achieve major elective posts in New York State. In 1969, John V. Lindsay, who lost the Republican party nomination in a primary, was still able to become Mayor of New York City because of his Liberal party nomination. In 1970, James Buckley, the nominee of the Conservative party, was elected United States Senator from New York State.

Currently the New York State Assembly which consists of 157 seats is almost evenly divided between the two major parties. Every two years it is a question who will be the majority party; usually, only a few Assemblymen make the difference. Minor party endorsements play a large and significant role in this balance of power. Examination of the vote for Assemblyman in one Nassau County district illustrates this point.* The 18th Assembly District of Nassau County, which in 1970 basically was comprised of the northwestern portion of Nassau County, contained 24,838 enrolled Republicans, 21,491 enrolled Democrats, 485 enrolled Conservatives and 526 enrolled Liberals. The total number of registered voters was 58,031, of which there were 10,741 blank (i.e., declined to enroll), void or missing enrollments, leaving a total of 47,290 enrolled voters. In November 3, 1970, 52,505 voters entered the general election voting booth of whom 48,289 cast a ballot for one of the nominated assembly candidates. The results of the election were:

Vincent R. Ballella, Jr.	Republican	21,696
Irwin J. Landes	Democratic	19,624
Nelson J. Gammons	Conservative	4,307
Irwin J. Landes	Liberal	3,661

*All statistics are taken from the *Annual Report of the Board of Elections, County of Nassau, 1970*. The enrollment statistics are those enrollments as of February 1, 1970, which were reported to the Secretary of State of New York. They do not reflect special enrollees who would have been eligible for the June 23, 1970, primary. However, since we are dealing here with the magnitude of the numbers involved, such statistics are valid.

Thus, the Liberal nomination of Irwin J. Landes was critical to victory and the failure of Vincent Balletta to gain the Conservative Party nomination was instrumental in his loss. Moreover, it can be seen that the power of each of the minor parties, despite its paucity of enrolled voters in such party, is magnified many times at the general election.

It is even more interesting that the victor in the general election won his Liberal designation in a primary where only 213 votes were cast, of which Irwin J. Landes received 119 write-in votes, Jack Tenzer received 32 and other candidates received 2 votes. After a judicial challenge on the results (*Tenzer v. Meisser*, Sup. Ct. Nassau Co. 1970, Index No. 6851/*aff'd*, 35 A.D. 2d 670), the Supreme Court, Nassau County, found that 20 for Landes and 3 votes for Tenzer were irregular, but that such changes were insufficient to change the result of the primary. Thus, a difference of 10 votes in the primary ultimately determined 3,661 votes for Landes on the Liberal line at the general election, and was the key to his victory. The incentive for party raiding which is present, in the face of such statistics, is obvious.

Other Assembly races in Nassau County also involved a minor party nomination which proved the key to either defeat or victory, while in still other races, a minor party nomination played no part in the result, *e.g.*, the 12th Assembly District, Joseph M. Margiotta, who received a plurality of 18,839 votes.

Minor party nominations were not only the key in Assembly races, but also they figured prominently in the Nassau County State Senate races. In the 7th District, State Senate, the Republican victor, Norman Levy, gained

*When a "petition for opportunity to ballot in a primary election" (Election Law §148) is filed, the enrolled voters of a party may write in any individual's name, even a non-party member such as Mr. Landes who was an enrolled Democrat.

his victory as a result of almost 13,000 votes on the Conservative line and was thus able to overcome his Democratic opponent's 57,435 votes. In both the 4th Senatorial District and the 5th Senatorial District in Nassau County, had the Democratic nominee also had the Conservative nomination, it would have been victorious. Here again, in certain districts, the minor party nomination was not a factor, e.g., in the 6th District, John R. Dunne, received a plurality of just over 40,000 votes.

The same analysis holds true for U.S. Congressional races, e.g., Rep. Norman F. Lent defeated Allard K. Lowenstein by 93,824 votes to 84,738. Congressman Lent had the Conservative Party nomination and received 23,856 votes on that line. (Lent won the Conservative primary election because the other person seeking the Conservative nomination had had his petitions invalidated by the courts. *Lent v. Farrell*, 34 A.D. 2d 978 [2d Dept. 1970].)

From these examples, the motive for party raiding is clear, and on all levels of government in New York State. It can also be seen that it is the low number of enrolled minor party members in Assembly, Senate and Congressional districts which presents the possibility of raiding — not just the state-wide enrollment figures which show that both the Liberal and Conservative parties have slightly over 100,000 enrollees.

C. Which is the least drastic alternative?

Presently two statutory means exist to prevent party raiding. The first is the delayed enrollment procedure. The second is the procedure established by Election Law, §332, whereby an individual's enrollment may be challenged, and if a hearing upholds the challenger's contentions, the individual may be purged from the party rolls, subject to judicial review. The use of §332 is cited by the petitioners as the "least drastic alternative" to the wider scope of delayed enrollment. *Matter of Zuckman v. Dono-*

hue, 191 Misc. 399, (Sup. Ct.), *aff'd*, 274 App. Div. 216 (3rd Dept.), *aff'd without opinion*, 298 N.Y. 627, 81 N.E. 2d 371 (1948); *In re Mendelson*, 197 Misc. 993 (Sup. Ct., 1950); *Matter of Werbel v. Gernstein*, 191 Misc. 274, (Sup. Ct. 1948); *Greenberg v. Cohen*, 175 Misc. 405 (Sup.Ct., 1940); *Matter of Newkirk*, 144 Misc. 765 (Sup. Ct., 1931).

Judge Mishler stated that the §332 procedure is "highly effective even on short notice before a primary." Append. 37. However, in the Court of Appeals decision, Judge Lombard noted:

"Section 332 is a narrowly drawn statute appropriate for striking from the enrollment rolls only one name at a time. Each such challenge requires a full judicial inquiry, with its high cost in money, time and manpower for the challenging party. Its efficacy, even in the single case is not clear for proof of a man's allegiance to one party or another is often difficult to secure. Unlike proof of residence, for which objective evidence, *e.g.*, ownership of a dwelling, car registration, or a driver's license, is easily at hand, proof of allegiance to one party or another demands inquiry into the voter's mind. The very great majority of voters have no closer contact with their political party than pulling the lever or marking the ballot in the voting booth. In the absence of the availability of evidence regarding a voter's party preference and faced with large-scale raiding, party officials relying only on section 332 would be virtually impotent."

Two points should be made in light of Judge Lombard's concise summary of §332. The first point demonstrates that if §332 were to be the sole method of preventing party raiding, then its application would be so harsh on an individual's rights that it would probably be unconstitutional; and the second point indicates, through an analysis of one of the above-cited raiding cases, how such an abuse of §332 would occur.

Under §330 of the Election Law, a procedure is set forth for legal challenges to the designating petitions which are required to place a candidate on the primary ballot. Each year the Courts of New York are deluged by Election Law cases brought on by primary candidates who seek to invalidate their opponent's designating petitions. If this can be done, the petitioners will win their party's nomination, because Election Law §149 provides, in essence, that an individual is deemed nominated if his petitions are the only valid petitions filed for a vacancy to be filled at a primary. Thus, the legal proceedings can result in gaining a party's nomination without having to run a campaign. Many times these legal challenges are initiated as a political strategy in order to tie up the supporters of a candidate in the courtroom while his opponents are out campaigning.

When §332 is examined, it is obvious that it is another potential weapon with which to fight an opponent in a campaign. Moreover, unlike §330 cases, a §332 case can tie up the opponent himself for extended hearings, both in Court and before the initial committee which considers the question of a valid enrollment. See *In re Mendelson*, *supra*, supplemental opinion.

A §332 proceeding is far more draconian than a §330 proceeding in that it attempts to delve into an individual's tenets and political principles. Thus, §332 is capable of being a chilling instrument of abuse by the "regular organization" of a political party which is engaged in a fight against genuine party insurgents.* This abuse is a reality, as evidenced by a series of cases which have arisen under this section. *Sullivan v. Power*, 24 A.D. 2d 709, *aff'd*, 16 N.Y. 2d 854, 210 N.E. 2d 652 (1965) (see the Appellate Division); *Lake v. Power*, 9 A.D. 2d 997, *aff'd*, 5 N.Y. 2d 755 (1958); *Rhatigan v. Power*, 282 App. Div. 838 (1953); *Scarfone v. Ruggiero*, 277 App. Div. 931 *aff'd*, 301 N.Y. 662, 93 N.E. 254 (1950); *Matter of Titus*, 117 App. Div. 621 (1907); also see the series of cases reported as *Matter of Goldshein v. D'Angelo*, 34 A.D. 2d 991 (1970).

*Moreover, who is to decide in such a case as to what are the true "... principles of the party ...". Election Law §174.

The second point demonstrates that even in the case where §332 was used to stop party raiders, §332 turned out not to be "highly effective", as Chief Judge Mishler contended. In 1931, certain Democrats in the City of Utica, New York, sought to raid the Socialist Party in that city in order to gain the Socialist nomination for candidates who already had the Democratic nomination. *Matter of Newkirk, supra*. There, approximately 75 individuals had, during 1930, decided to raid the Socialist Party. This was not discovered until the August, 1931, preceding the fall primary. The Chairman of the Socialist Party of Oneida County, after receiving a challenge to the 75 enrollments, appointed a subcommittee pursuant to §332 to make an initial determination. After reviewing the report of the subcommittee, he found that 21 purported enrollees had signed written renunciations of their enrollment, and that an additional 47 enrollees were not valid. Thereafter, judicial review was sought and the Court upheld the County political chairman's determination in 27 of the 68 cases. Of those who had not signed renunciations, however, the Court upheld only nine of the cancellations. Approximately 79% (38 individuals) of the political Chairman's determinations, for those who had not signed renunciations, were found to be erroneous.

There are three inferences which could be drawn from this case. First, §332 is not a viable means to prevent party raiding; or second, §332 is unworkable inasmuch as the evidence required, (i.e., an individual's intent,) "is in practice unworkable." *Swift & Co. v. Wickham*, 382 U.S. 111, 123, *opinion* Harlan, J. (1965); or third, the county political chairman in *Newkirk* was engaging in the very abuse of §332 described above.

Thus, Election Law §332 sets forth a proceeding which has a number of drawbacks. First, it requires an extraordinary amount of money, time and manpower; second, it requires an examination into an individual's intent — a

process fraught with the potential for chilling the right of free speech; and third, it is a likely instrument for abuse. Indeed, it is a logical conclusion that a §332 proceeding is an invasion of an individual's constitutional rights than is the conclusion that §186 is unconstitutional.

POINT IV

Delayed Enrollment is Constitutional under either the Rational Basis Test or the Compelling State Interest Test.

The initial issue which must be decided by this Court is which constitutional test is to be applied to the New York State enrollment statutes. In dealing with a state primary election where suspect class, race or wealth discrimination is absent* and where there is a vigorous two-party system, the applicability of the compelling state interest test is tenuous, both in light of the facts and the precedents.

The compelling state interest test is one which gained its present status literally by its own bootstraps. *Dunn v. Blumstein, supra*, Blackman, J., concurring opinion; see *Kramer v. Union Free School District*, 395 U.S. 621 (1969), Stewart, J., dissenting opinion at 639.

The compelling state interest test came into full force for Election Law cases in *Kramer, supra*. The majority in *Kramer* (opinion by Justice Warren) relied upon the court's previous opinion in *Carrington v. Rash*, 380 U.S. 89 (1965), opinion by Justice Stewart. In *Kramer*, however,

*The *White Primary* cases and *Bullock v. Carter*, 405 U.S. 134 (wealth), involves those areas which have traditionally been protected by constitutional safeguards. In the case herein, those cases cannot be used to mechanically apply constitutional principles applicable in general elections to primary elections free from the onerous taint of race, wealth or class discrimination as there is an inherent discrimination (party membership) involved in a closed primary system and some method is necessary to establish party membership.

Justice Stewart dissented on the ground that the classification therein was rationally related to a permissive legislative end. Moreover, in enunciating the compelling state interest test, *Kramer, supra*, at 627, cited *Carrington, supra*, at 96. Yet, *Carrington*, at 96, only found that "states may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state." (Cases cited omitted.) Thus, *Carrington* found that the Texas Constitution, by absolutely *preventing a soldier ever* to controvert the presumption of non-residence, imposed an invidious distinction in violation of the Fourteenth Amendment. There is, therefore, somewhat of a gap between the seed of the test in *Carrington* and the flower of the test in *Kramer*.

Such analysis is of current validity since *Dunn, supra*, restated almost word for word the test set forth by *Kramer*. See *Dunn v. Blumstein*, 405 U.S. at —, 40 U.S.L.W. at 4272; *Kramer v. Union Free School District*, 395 U.S. at 627.

Although *Kramer* seemed to exempt primaries from the compelling state interest test*, the court below utilized the compelling state interest test in determining that delayed enrollment advanced a valid interest of the state. Yet, the Court of Appeals should not have found it necessary to utilize the compelling state interest test since in *Bullock v. Carter*, 405 U.S. 134, 143 (1972), the Court stated,

"Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."

And, in this case involving a primary election, the Court of Appeals had the opportunity presented to utilize the *Bullock* exception. The court below was faced with a statute

*"We need express no opinion as to whether the state, in some circumstances, might limit the exercise of the franchise to those primarily interested or primarily affected." *Kramer, supra*, at 632.

which presents an additional voter qualification to the three qualifications upheld in *Kramer* and presents the additional qualification in an election which, by its very definition (closed primary), inherently demands the added requirement.

In *Kramer*, the Court found that states have the power "to impose a reasonable citizenship, age and residency requirements on the availability of the ballot." (Cases cited omitted.) 395 U.S. at 625. However, the instant case, involving a closed primary where only members of a political party may participate in that party's primaries, demonstrates that an additional qualification is absolutely required* to insure that the members are *bona fide*.

Since the case herein does not involve the "denial" of a vote found in *Kramer* and involves a closed primary election, the compelling state interest test did not have to be used, especially since the test has *never* been used before for a primary election case. Instead, the traditional "rational basis" test could have been used:

"The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice their laws result in some equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961)

The use of this test in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969) shows the inappropriateness of the compelling state interest

*If such qualification cannot be constitutionally set forth by the various states of the union, then all primaries must be open to the voters of every party. It might be noted that at the 1972 Democratic National Convention, the delegates voted to extend the reforms enacted for the 1972 Convention and to initiate another reform to end the primary election practice of allowing open primaries where Republicans may cross over and vote for Democrats. *New York Post*. 7-12-72, 27.

test herein, especially since the *McDonald* statutes were not shown to be discriminating or "to have an impact on appellants ability to exercise the fundamental right to vote" at 807 (Emphasis supplied).

Even if the rational state interest test may not be sufficient in this case to strike the correct balance between the interest of the State and the interest of an individual to participate in that primary, this Court could use the "close scrutiny" test set forth in *Bullock, supra*:

"[T]he laws must be closely scrutinized and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." 405 U.S. at—, 31 L. Ed. 2d at 100.

Under either standard, the constitutionality of §186 is clear as the avoidance of party raiding serves a rational basis of the Legislature and has been shown to be reasonably necessary.

Assuming, *arguendo*, that the compelling state interest test does apply, and that the *Jordan, supra*, and *Addabbo, supra*, cases do not apply, the decision below should be upheld by this Court.

It has already been pointed out that the recent stringent tests for voting in a general election cannot be mechanically applied to a primary election by citing the previous Supreme Court decisions which involved primaries. In such cases special circumstances were always present.*

*These cases are *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927). Even in *Bullock, supra*, there was a suspect classification involved, e.g., wealth. In the one case when this Court did choose to decide upon a provision concerning the rules for a primary election and which did not involve suspect classification of race, wealth or discrimination, the Court upheld a limitation for entering a primary. *Ray v. Blair*, 343 U.S. 214 (1952). Yet in *Ray*, however, it was pointed out that the "real election takes place in the [Alabama] primary," so that "limitations as to entering a primary controls the result of the general election." 343 U.S. at 226.

What is at stake herein is the method by which a State political party chooses to protect the integrity of the nominating system that it uses. New York State has four methods: committees, conventions, caucuses and primary elections, with the latter being the predominant. In other states, caucuses or conventions may predominate.*

New York State's deferred party membership provisions were established with the first primary law and remain basically unchanged. Throughout this period, indications of enrollment fraud have cropped up, *e.g.*, the purging provisions of 1904, *supra*, when supplemental enrollment periods still existed and the attempts at party raiding in 1931. *Matter of Newkirk, supra*. Presently, with two key minor parties, Liberal and Conservative, whose nominations are frequently the decisive factor in general elections, the motivation for party raiding is quite strong.

Delayed enrollment is a fundamental element in the enrollment system in order to avoid fraud. Such purpose was upheld by this Court in *Dunn v. Blumstein, supra*, 40 U.S.L.W. at 4274 (March 21, 1972). And delayed enrollment is as needed for primary elections just as a voter registration system is needed in general elections; so that the recognition in *Dunn, supra*, of the value of voter registration systems to deter fraud should be extended to similar recognition of delayed enrollment. In *Dunn, supra*, the purpose of preventing "a fraudulent evasion of state voting standards . . . in most . . . states . . . is served by a system of voter registration." 40 U.S.L.W. at 4274. Under these conditions, New York State has shown the highest and most compelling need for delayed enrollment.

*See *Irish v. Democratic-Farmer-Labor Party*, 287 F. Supp. 794 (D. Minn. 1968), *aff'd*, 399 F. 2d 119 (8th Cir. 1968); 25 Am. Jur. 2d *Elections*, §49 (1966).

POINT V

New York's deferred enrollment system is not a "grandfather clause."

Under New York State's registration and enrollment procedure, there is no requirement that the petitioners had to be involved in the 1971 elections whatsoever. The petitioners, however, contend under New York State's election statutes that "the petitioned [had] to have been registered to vote in the 1971 local elections." Petitioners' Brief, p. 42. Instead, under the provisions of permanent person registration, Election Law, Article 15, once an individual has registered to vote and has enrolled in a political party, such registration and enrollment continues so long as a person votes in a general election "at least once in each period of two successive calendar years." Election Law §352. Permanent personal registration was adopted throughout New York State in 1967, Election Law, §350(2), although certain counties, *e.g.*, Nassau County and the five counties which comprise New York City, adopted permanent personal registration during the early fifties. Thus, the petitioners were merely required to register and to enroll during 1971; they were not required to participate in the 1971 elections.

The petitioners misconceive the workings of delayed enrollment; in no instance is participation in the 1972 primary election conditioned upon past participation in the 1971 elections.

A. Delayed enrollment and grandfather clauses

The relation of a grandfather clause concept to delayed enrollment is an illogical attempt to apply past decisions of this Court to the instant matter. Delayed enrollment applies equally to all individuals. There is no ancestry provision, either implicit or explicit, in its operation. Past

decisions of this Court, such as *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Meyers v. Anderson*, 238 U.S. 368 (1915) and *United States v. State of Louisiana*, 380 U.S. 145 (1968), show that the effect of a grandfather clause was unequal in its application to the electorate in general.

To cloak delayed enrollment with the threads of the term "grandfather clause" is to overlook the goals and legal application of delayed enrollment.

It has already been outlined that enrollment and registration are separate processes. The petitioners have used statistics which stem from participation in the 1968 general elections in an attempt to claim a "disproportionate effect on minority groups by delayed enrollment." The fact that less than 50% of the qualified voters in the Counties of New York, Kings and Bronx participated in the 1968 general elections (statistics compiled pursuant to the 1965 Voting Rights Act, 42 U.S.C. §§1973), bears no logical connection to delayed enrollment. Conceivably, a defect could exist in the voter registration system and thus lead to the low voter turnout. Equally likely as an inference, however, is the premise that there is a defect in the system used for physically casting one's ballot at the polling place. Other inferences are also possible, *e.g.*, rain or a damp overcast sky, on the day of general election lowered voter turnout. Even to grant the presence of some defect in the registration or general voting system, though, does not lead to any conclusion with regard to delayed enrollment, since the enrollment process is separate from the registration process. The petitioners' contentions in this regard are, therefore, not valid.

The fallacy in the petitioners' argument is pointed out by another line of thought. An individual, duly registered and enrolled under permanent personal registration for calendar year 1968, could have failed to cast a ballot in

the 1968 general election. Thus, he would be included in the statistic that fewer than 50% voted in the 1968 election. Yet, this same individual could have remained eligible, both to vote in the forthcoming 1972 general election and in the June 1972 primary, by having cast a ballot in the general elections from any of the aforementioned counties, thereby fulfilling the permanent registration requirement of voting once every two years.

The conclusion to be drawn from this analysis is that delayed enrollment has not been demonstrated, either logically or by evidence to have a disproportionate effect on minority group participation in the primary election process.

The petitioners have also failed at any point throughout this case to demonstrate that delayed enrollment has a deleterious effect on the turnout for a primary. In fact, the experience over a long period of time would weaken the petitioners' case if it had been raised.

Participation in the nomination process (i.e., the basic *raison d'être* for primaries) has historically ranged between 25 and 30% of the electorate. Such studies are based on actual voter turnout and opinion surveys. Leiserson, *Parties & Politics*, 1958, pp. 147 and 294. Such studies also reveal that voter turnout in the primaries varies significantly in terms of the strength of the two major parties in a state; so that as one party over a period of years becomes dominant within a state, the percentage of individuals voting in the primary of the weaker party declines, while at the same time there is a corresponding increase in the percentage in the primary of the dominant party. Leiserson, p. 147, citing V.O. Key, *American State Politics*, 1956, pp. 99-118. We can draw the conclusion that delayed enrollment does not play a part in such turnout.

POINT VI

Delayed enrollment does not abridge the right to travel.

This Court has recognized that freedom to travel is a right protected by the Constitution, *Shapiro v. Thompson*, 394 &S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 31 L. Ed. 2d 274 (1972). Delayed enrollment under Election Law §186 is not a durational residency requirement such as was encountered in *Dunn*, *supra*.

It has been shown previously that the petitioners do not present a right to travel controversy to this Court because they have never lacked residency in New York for the time period applicable to this case. This claim of an abridgement to the petitioners' right to travel could only be brought forth by an individual who is a recent New York State resident or who has moved from one county to another since the last general election. This claim was present in a case previously brought by the same attorneys, *Bachrow v. Rockefeller*, 71 C 930 (E.D.N.Y. 9/8/71, three-judge Court).

Bachrow was dismissed as moot, as there were no primary contests in which the plaintiffs therein could vote. Moreover, this Court has considered the very issue of a recently arrived New York State resident and dismissed the case for want of a substantial federal question in *Jordan v. Meisser*, 405 U.S. 907, 30 L. Ed. 2d 778 (1972).

The dismissal in *Jordan* was on the merits and controls in regard to a recently arrived New York resident, Stern and gressman, *Supreme Court Practice* 4th Ed. 1969, §5.18 at 233. Furthermore, since Wayne P. Jordan was not eligible for special enrollment under §187, he then fell under the rule of delayed enrollment of §186 (i.e., if one

is not eligible for an exception to the general rule, the general rule applies). Thus, *Jordan* not only is precedent for this point, but also is precedent for the entire case.*

In the decision of the District Court, Chief Judge Mishler found that both the Voting Rights Act Amendments of 1970 invalidated durational residency requirements and that delayed enrollment fell under this prohibition. The Court of Appeals correctly reversed this holding, finding that the abolition of durational residency requirements in 42 U.S.C. §1973 aa-1(d) referred solely to general Presidential elections and not to primary elections. *Rosario*, *supra*, 654.

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the prohibition of durational residency requirements by the Voting Rights Act Amendments of 1970 was upheld. Nowhere in *Oregon's* various opinions did the Court pass upon presidential primaries, since they were obviously not included in the 1970 Act.

Congress, moreover, did not intend primary elections to be included under the purview of the durational residency prohibition for a very practical reason. Presidential primaries are conducted, in the several states of the Union from February (New Hampshire) to June (New York and

*The effect of this Court's dismissal in *Jordan v. Meisser* has been the subject of debate in this case, inasmuch as the MOTION TO DISMISS OR AFFIRM by the Attorney General of the State of New York had inadvertently asserted appellant Jordan's right to special enrollment (Election Law §187(2)(c), (in direct contrast to the specific holding in the New York Supreme Court's opinion), whereas the MOTION TO DISMISS OR AFFIRM by the County Attorney of Nassau County correctly cited the bar of Election Law §187(6) to the right of Mr. Jordan to specially enroll. During argument before the Court below, the Nassau County Attorney not only informed the Court of the correct interpretation of §187 (Appellee's Brief, p. 39), but the County Attorney also handed to the Court below and to each of the petitioner's attorneys a copy of the *Jordan* MOTION TO DISMISS OR AFFIRM of the Nassau County Board of Elections.

*In 1972, U.S. Senator Hubert Humphrey received more votes from all the presidential primaries than did U.S. Senator George McGovern.

California) during Presidential election years. Short durational residency requirements would allow a relatively small bloc of voters to vote in more than one state's primary election and thereby multiply the psychological effect, that winning or losing by a few thousand votes, has upon the somewhat informal process — and the surely non-systematic method — which constitutes the selection of a political party's nominee for President. It should be noted that the total votes which a candidate receives in all the various presidential primary elections* is not as important as is the number of state presidential primary elections which are won.

Unlike the delay in voting eligibility which is caused by a durational residency requirement, delayed enrollment results in a wait solely from the fact that there is only one primary election and only one general election held each year. Under a durational residency requirement, the wait is a fixed period of time. Under delayed enrollment, the wait can vary in duration from one month to eleven months, District Court opinion, Appendix 45. The delay which results from §186 is therefore inherent in the design of the statute which prevents would-be raiders from doing two things at once. Indeed, the inherent delay can be seen from the fact that if petitioner Eisner had specially enrolled when he first became of voting age on his 21st birthday in December 1970, he would have had to wait over nine months from his enrollment to his participation in the September 14, 1971, primary.

The New York statute therefore does not abridge the right to travel, since it fixes no specific time period. Instead, the duration of any wait is a result of an individual's timing of his enrollment — not of an individual's exercising his right to travel.

*In 1972, U.S. Senator Hubert Humphrey received more votes from all the presidential primaries than did U.S. Senator George McGovern.

CONCLUSION

The opinion and judgement of the Court of Appeals should be affirmed.

Dated: September 14, 1972.

Respectfully submitted

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NOTE: Where it is feasible, a syllabus (headnote) will be prepared, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 300 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROSARIO ET AL. V. ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-1371. Argued December 13, 1972—Decided March 21, 1973

Petitioners challenge the constitutionality of New York Election Law § 186, which requires a voter to enroll in the party of his choice at least 30 days before the general election in order to vote in the next party primary. Though eligible to enroll before the previous general election, petitioners failed to do so and were therefore ineligible to vote in the 1972 primary. The Court of Appeals, reversing the District Court, upheld the New York scheme, which it found to be a permissible deterrent against the practice of primary election "raiding" by opposing party members. *Held*: New York's delayed-enrollment scheme did not violate petitioners' constitutional rights. Pp. 4-10.

(a) Section 186 did not absolutely prohibit petitioners from voting in the 1972 primary, but merely imposed a time deadline on their enrollment, which they chose to disregard. Pp. 4-5.

(b) The statute does not deprive voters of their right under the First and Fourteenth Amendments to associate with the party of their choice or subsequently to change to another party, provided that the statutory time limit for doing so is observed. Pp. 6-7.

(c) The cut-off date for enrollment, which occurs about eight months before a presidential, and 11 months before a nonpresidential, primary, is not arbitrary when viewed in light of the legitimate state purpose of avoiding disruptive party raiding. Pp. 7-9.

458 F. 2d 649, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1371

Pedro J. Rosario et al.,
Petitioners,

v.

Nelson Rockefeller, Governor
of the State of New
York, et al.

On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[March 21, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

For more than 60 years, New York has had a closed system of primary elections, whereby only enrolled members of a political party may vote in that party's primary.¹ Under the State's Election Law, a registered voter enrolls as a party member by depositing an enrollment blank in a locked enrollment box. The last day for enrollment is 30 days before the general election each year. Section 186 of the Election Law provides that the enrollment boxes shall not be opened until the Tuesday following the general election, and party affiliations are then entered on the State's official registration books. The voter is then duly enrolled as a member of his party and may vote in a subsequent primary election.²

¹ See N. Y. Election Law § 131. The State's first comprehensive primary law was enacted in 1911.

² Section 186 provides, in pertinent part:

"All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following

The effect of § 186 is to require a voter to enroll in the party of his choice at least 30 days before the general election in November in order to vote in the next subsequent party primary. If a voter fails to meet this deadline, he cannot participate in a party primary until after the following general election. Section 187 provides an exemption from this waiting period for certain classes of voters, including persons who have attained voting age after the last general election, persons too ill to enroll during the previous enrollment period, and persons who moved from one place to another within a single county. Under § 187, these classes of voters may be specially enrolled as members of a party even after the general election has taken place.²

the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. . . . Such enrollment shall be complete before the succeeding first day of February in each year." This section finds its roots in the 1911 law. L. 1911, c. 891, § 19.

² Section 187 provides, in pertinent part:

"Application for special enrollment, transfer or correction of enrollment. 1. At any time after January first and before the thirtieth day preceding the next fall primary, except during the thirty days preceding a spring primary, and except on the day of a primary, a voter may enroll with a party, transfer his enrollment after moving within a county, and under certain circumstances, correct his enrollment, as hereinafter in this section provided.

"2. A voter may enroll with a party if he did not enroll on the day of the annual enrollment (a) because he became of age after the preceding general election, or (b) because he was naturalized subsequent to ninety days prior to the preceding general election, or (c) because he did not have the necessary residential qualifications as provided by section one hundred fifty, to enable him to enroll in

The petitioners are New York residents who became eligible to vote when they came of age in 1971. Although they could have registered and enrolled in a political party before the cutoff date in 1971—October 2—they failed to do so.⁴ Instead, they waited until early December 1971 to register and to deposit their enrollment blanks. At that time, they could not be specially and immediately enrolled in a party under § 187, since they had attained the voting age before, rather than after, the 1971 general election. Hence, pursuant to § 186, their party enrollment could not become effective until after the November 1972 general election. Because of

the preceding year, or (d) because of being or having been at all previous times for enrollment a member of the armed forces of the United States as defined in section three hundred three, or (e) because of being the spouse, child or parent of such member of the armed forces and being absent from his or her county of residence at all previous times for enrollment by reason of accompanying or being with such member of the armed forces, or (f) because he was an inmate or patient of a veterans' bureau hospital located outside the state of New York at all previous times for enrollment, or the spouse, parents or child of such inmate or patient accompanying or being with such inmate or patient at such times, or (g) because he was incapacitated by illness during the previous enrollment period thereby preventing him from enrolling."

⁴ The petitioners themselves admit this failure. The present consolidated case originated in two complaints, one by the petitioner Rosario and other named plaintiffs, on behalf of a class, and one by the petitioner Eisner. Paragraph 6 of Rosario's complaint stated that "[e]ach of these plaintiffs could have registered and enrolled on or before October 2nd, 1971, the last date of registration for the November 1971 elections. They each did not do so." Similarly, Eisner's complaint stated, in paragraph 5: "Plaintiff, Eisner, first became eligible to vote on December 30, 1970, upon the attainment of his twenty-first birthday." Whether the petitioners failed to enroll before the deadline because of inadvertence, because of lack of interest in the essentially local 1971 general election, or for other reasons is not clear, since none of them advances any explanation for this failure to enroll.

New York's enrollment scheme, then, the petitioners were not eligible to vote in the presidential primary election held in June 1972.

The petitioners filed these complaints for declaratory relief, pursuant to 42 U. S. C. § 1983, alleging that § 186 unconstitutionally deprived them of their right to vote in the June primary and abridged their freedom to associate with the political party of their choice. The District Court, in an unreported opinion, granted them the declaratory relief sought. The Court of Appeals for the Second Circuit reversed, holding § 186 constitutional. 458 F. 2d 649. We granted certiorari, but denied the petitioners' motion for summary reversal, expedited consideration, and a stay. 406 U. S. 957 (1972).^{*}

The petitioners argue that, through § 186, New York disenfranchised them by refusing to permit them to vote in the June 1972 primary election on the ground that they had not enrolled in a political party at least 30 days prior to the preceding general election. More specifically, they contend that § 186 has operated to preclude newly registered voters, such as themselves, from participating in the primary election of the party of their choice. According to the petitioners, New York has no "compelling state interest" in its delayed enrollment scheme so as to justify such disenfranchisement, and hence the scheme must fall. In support of this argument, the petitioners rely on several cases in which this Court has struck down, as violative of the Equal Protection Clause, state statutes that disenfranchised certain groups of people. *Carring-*

^{*} Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is "'capable of repetition, yet evading review.'" *Dunn v. Blumstein*, 405 U. S. 330, 333 n. 2 (1972); *Moore v. Ogilvie*, 394 U. S. 814, 816 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911).

ton v. Rash, 380 U. S. 89 (1965); *Kramer v. Union Free School District No. 15*, 395 U. S. 621 (1969); *Cipriano v. City of Houma*, 395 U. S. 701 (1969); *Evans v. Cornman*, 398 U. S. 419 (1970); *City of Phoenix v. Kolodziejski*, 399 U. S. 204 (1970); *Dunn v. Blumstein*, 405 U. S. 330 (1972).

We cannot accept the petitioners' contention. None of the cases on which they rely is apposite to the situation here. In each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote. In *Carrington*, for instance, the Texas Constitution disabled all servicemen from voting in Texas, no matter how long they had lived there. In *Kramer*, residents who were not property owners or parents were completely precluded from voting in school board elections. In *Cipriano* and *Kolodziejski* the States prohibited non-property owners from ever voting in bond elections. In *Evans*, Maryland refused to permit residents at the National Institutes of Health, located within its borders, ever to vote in state elections. And in *Dunn*, Tennessee totally disenfranchised newly arrived residents, i. e., those who had been residents of the State less than a year or residents of the county less than three months before the election.

Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary. Since the petitioners attained voting age before the October 2, 1971 deadline, they clearly could have registered and enrolled in the party of their choice before that date and been eligible to vote in the June 1972

primary.⁴ Indeed, if the petitioners had not been able to enroll in time, i. e., if they had attained the requisite age after the 1971 general election, they would have been eligible for special enrollment under § 187. The petitioners do not say why they did not enroll prior to the cutoff date, but it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.⁵

For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary.⁶

⁴ Not only would the petitioners have been eligible for the 1972 primary, but, since they were eligible in 1971 for special enrollment under § 187, they could have, if they had timely registered and enrolled, participated in the September 14, 1971 primary.

⁵ The District Court held that the petitioners' failure to enroll before the cutoff date was not truly voluntary, because it was not done with sufficient awareness of the relevant circumstances and likely consequences. But this argument could well be made any time a State imposes a time limitation or cutoff point for registration or enrollment. The petitioners do not claim that they were unaware of New York's deadline for enrollment.

⁶ The dissent states that "the Court apparently views this statute as a mere 'time deadline' on petitioners' enrollment . . . that postpones through the next primary rather than denies altogether petitioners' voting and associational rights." *Post*, pp. 4-5. And it argues that our decisions "have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred." *Post*, p. 5. But the dissent mischaracterizes our view of § 186. We do not uphold the statute on

Indeed, under the New York law, a person may, if he wishes, vote in a different party primary each year. All he need do is to enroll in a new political party between the prior primary and the October cutoff date. For example, one June he could be a registered Republican and vote in the Republican primary. Before enrollment closed the following October, he could enroll in the Democratic Party. Since that enrollment would be effective after the November general election and before the following February 1, he could then vote in the next Democratic primary. Before the following October, he could register to vote as a Liberal, and so on. Thus, New York's scheme does not "lock" a voter into an unwanted pre-existing party affiliation from one primary to the next.*

the ground that it is merely a prohibition on voting in one particular primary, rather than a permanent ban on voting. That is neither our point nor the effect of the law. The point is that the statute did not prohibit the petitioners from voting in any election, including the 1972 primary, had they chosen to meet the deadline established by the law.

* The petitioners also argue that § 186 establishes a durational residence requirement unconstitutional under *Dunn v. Blumstein*, *supra*, and violates the right to travel under *Shapiro v. Thompson*, 394 U. S. 618 (1969). Since the exemption in § 187 applies only to persons whose new residence is within the same county as their old residence, persons who arrive in New York State or move from one county to another after the cutoff date, and deposit their enrollment blank at that time, are barred by the delayed enrollment scheme from voting in the next primary election. According to the petitioners, this constitutes an unconstitutional durational residence requirement and is violative of the 1970 amendments to the Voting Rights Act of 1965, 42 U. S. C. § 1973a-a (1).

The petitioners, however, lack standing to raise these contentions. They make no claim that they are recently arrived residents of the State nor that they have moved from one county to another nor even that they have changed their residence at all within the period relevant here. The petitioners cannot represent a class to which they do not belong.

The only remaining question, then, is whether the time limitation imposed by § 186 is so severe as itself to constitute an unconstitutionally onerous burden on the petitioners' exercise of the franchise or on their freedom of political association. As the dissent acknowledges, the State is certainly justified in imposing some reasonable cutoff point for registration or party enrollment, which citizens must meet in order to participate in the next election. *Post*, p. 3. Hence, our inquiry must be whether the particular deadline before us here is so justified.

The cutoff date for enrollment prescribed by § 186 occurs approximately eight months prior to a presidential primary (held in June) and 11 months prior to a non-presidential primary (held in September). The petitioners argue that this period is unreasonably long, and that it therefore unduly burdens the exercise of their constitutional rights. According to the petitioners, § 186 requires party enrollment before prospective voters have knowledge of the candidates or issues to be involved in the next primary elections. The requirement is especially onerous, the petitioners say, as applied to new voters, who have never before registered to vote or enrolled in a political party.

It is true that the period between the enrollment deadline and the next primary election is lengthy. But that period is not an arbitrary time limit unconnected to any important state goal. The purpose of New York's delayed enrollment scheme, we are told, is to inhibit party "raiding," whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary. This purpose is accomplished, the Court of Appeals found, not only by requiring party enrollment several months in advance of the primary, on the theory that "long-range planning in politics is quite difficult,"

458 F. 2d, at 653, but also by requiring enrollment prior to a general election. The reason for the latter requirement was well-stated by the court below:

"[T]he notion of raiding, its potential disruptive impact, and its advantages to one side are not likely to be as apparent to the majority of enrolled voters nor to receive as close attention from the professional politician just prior to a November general election when concerns are elsewhere as would be true during the 'primary season,' which, for the country as a whole, runs from early February until the end of June. Few persons have the effrontery or the foresight to enroll as say, 'Republicans' so that they can vote in a primary some seven months hence, when they full well intend to vote 'Democratic' in only a few weeks. And, it would be the rare politician who could successfully urge his constituents to vote for him or his party in the upcoming general election, while at the same time urging a cross-over enrollment for the purpose of upsetting the opposite party's primary. Yet the operation of section 186 requires such deliberate inconsistencies if large-scale raiding were to be effective in New York. Because of the statute, it is all but impossible for any group to engage in raiding." *Ibid.*

It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal. Cf. *Dunn v. Blumstein*, *supra*, at 345; *Bullock v. Carter*, 405 U. S. 134, 145 (1972). In the service of that goal, New York has adopted its delayed enrollment scheme; and an integral part of that scheme is that, in order to participate in a primary election, a person must enroll *before* the preceding general election. As the Court of Appeals stated: "Allowing enrollment any time after

the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another." 458 F. 2d, at 653. For this reason, New York's scheme requires an insulating general election between enrollment and the next party primary. The resulting time limitation for enrollment is thus tied to a particularized legitimate purpose, and is in no sense invidious or arbitrary. Cf. *Lippitt v. Cipollone*, 404 U. S. 1032 (1972).¹⁰

New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard.

Accordingly, the judgment below is

Affirmed.

¹⁰ The petitioners contend that New York already has less drastic means to prevent raiding—means that would accomplish the State's goal yet would permit the registrant who inadvertently failed to enroll in time to vote in the primary. Specifically, the petitioners point to § 332 of the State's Election Law, which provides that the party enrollment of any voter may be challenged by any party member and, upon the determination by the chairman of the party's county committee that the voter is not in sympathy with the principles of the party, may be cancelled by a justice of the State Supreme Court after a hearing. That section, however, is clearly too cumbersome to have any real deterrent effect on raiding in a primary. Every challenge to a would-be raider requires a full administrative and judicial inquiry; proof that the challenged voter is not in sympathy with the party's principles demands inquiry into the voter's mind; and even if the challenge is successful, it strikes from the enrollment books only one name at a time. In the face of large-scale raiding, § 332 alone would be virtually ineffectual. We agree with the Court of Appeals that "[i]n requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means." 458 F. 2d, at 654.

SUPREME COURT OF THE UNITED STATES

No. 71-1371

Pedro J. Rosario et al.,

Petitioners,

v.

Nelson Rockefeller, Governor
of the State of New

York, et al.

On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[March 21, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

I

It is important at the outset to place New York's cut-off date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a presidential primary and 11 months before a nonpresidential one.¹ The Court recognizes, as it must, that the period between the enrollment and the primary election is a "lengthy" one.² Indeed, no other State has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.³ And New York

¹ October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus the deadline was actually some eight and one-half months before the primary. In nonpresidential years, the cutoff runs from early October until the following September.

² Court opinion, p. 8.

³ The State does not dispute this point. See Tr. of Oral Arg., p. 34. Massachusetts, Illinois, Ohio, New Jersey, and Texas permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice. See Annotated Laws of Massachusetts, c. 53, §§ 37, 38; Illinois Annotated Statutes, §§ 5-30; 7-43-7-45; New Jersey Statutes Annotated,

concedes that only one other State—Kentucky—has imposed as stringent a primary registration deadline on persons with prior party affiliations.⁴ Confronted with such a facially burdensome requirement, I find the Court's opinion unconvincing.

The right of all persons to vote, once the State has decided to make it available to some, becomes a basic one under the Constitution. *Dunn v. Blumstein*, 405 U. S. 330 (1972); *Kramer v. Union Free School District*, 395 U. S. 621 (1969); *Carrington v. Rash*, 380 U. S. 89 (1965). Self-expression through the public ballot equally with one's peers is the essence of a democratic society. *Reynolds v. Sims*, 377 U. S. 533 (1964). A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family. Whatever his disagreement may be with the judgments of public officials, the citizen should never be given just cause to think that he was denied an equal right to elect them.

Yet the Court today upholds a statute which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See *Williams v. Rhodes*, 393 U. S. 23 (1968); *NAACP v. Alabama*, 357 U. S. 449

19:23-45; Vernon's Annotated Texas Statutes, Tit. 9, Art. 13.01a; Ohio Revised Code, § 3513.19.

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. California Election Code, §§ 22, 203, 311-312 (registration closes in California 53 days before a primary); Purdon's Pennsylvania Statutes Annotated, Tit. 25, §§ 291 et seq. (registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. Michigan Compiled Laws Annotated, §§ 168.570, 168.575-168.576. See Petitioners' Brief, pp. 32-33.

⁴ Tr. of Oral Arg., p. 34.

(1958); *United States v. Robel*, 389 U. S. 258 (1967). The Court justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as required by New York law, eight months prior to the presidential primary. We are told that petitioners "clearly could have registered and enrolled in the party of their choice" before the cutoff date and been eligible to vote in the primary, but for undetermined reasons "chose not to," and that their disenfranchisement resulted from "their own failure to take timely steps to effect their enrollment."¹

If the cutoff date were a less severe one, I could agree. Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. But it is difficult to perceive any persuasive basis for a registration or party enrollment deadline eight to 11 months prior to election. Failure to comply with such an extreme deadline can hardly be used to justify denial of a fundamental constitutional right. Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation. *Ex parte Siebold*, 100 U. S. 37 (1879); *Nixon v. Herndon*, 273 U. S. 536 (1927); *Lane v. Wilson*, 307 U. S. 268 (1939); *Baker v. Carr*, 369 U. S. 189 (1962); *Gray v. Sanders*, 372 U. S. 368 (1963); *Wesberry v. Sanders*, 376 U. S. 1 (1964); *Reynolds v. Sims*, *supra*; *Carrington v. Rash*, *supra*; *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966); *Kramer v. Union Free School District*, *supra*; *Cipriano v. City*

¹ Court opinion, pp. 5, 6. See also p. 10 where the Court refers to § 186 as merely imposing "a legitimate time limitation on their [petitioners'] enrollment, which they chose to disregard."

of *Houma*, 395 U. S. 701 (1969); *Evans v. Cornman*, 398 U. S. 419 (1970); *City of Phoenix v. Kolodziejski*, 399 U. S. 204 (1970); *Bullock v. Carter*, 405 U. S. 134 (1972); *Dunn v. Blumstein*, *supra*.

The majority excuses the challenged statute because it does not "absolutely" disenfranchise petitioners or impose any absolute ban on their freedom of association.* The State likewise contends this is "not a disenfranchising statute."¹ The Court apparently views this statute as a mere "time deadline" on petitioners' enrollment that disadvantages no identifiable class and that postpones through the next primary rather than denies alto-

* See the Court's opinion, at p. 5:

"Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statutes merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."

Similarly at p. 6:

"For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."

And p. 10:

"New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard."

In all these instances, the majority seeks to distinguish a "time limitation" from an absolute disenfranchisement of petitioners or an absolute ban on their associational rights.

¹ Tr. of Oral Arg., p. 35.

gether petitioners' voting and associational rights.⁸ I cannot agree. Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial. And any statute which imposes for eight or 11 months an absolute freeze on party enrollment and the consequent right to vote totally disenfranchises a class of persons who, for quite legitimate reasons, decide to register closer than eight months to the primary date and those who, for equally legitimate reasons, wish to choose or alter party affiliation. Our decisions, moreover, have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that any serious burden or infringement on such "constitutionally protected activity" is sufficient to establish a constitutional violation, *Dunn v. Blumstein*, *supra*, at 343; *NAACP v. Button*, 371 U. S. 419, 438 (1963); *Reynolds v. Sims*, *supra*, at 561-562.

II

The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal";⁹ that it is "tied to a particularized legitimate purpose and is in no sense invidious or arbitrary."¹⁰ The Court does not explain why this formulation was chosen, what precedents support it, or how and in what contexts it is to be applied. Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and confusion as to how we will approach future significant bur-

⁸ Court opinion, p. 5 and n. 6 *supra*.

⁹ Court opinion, p. 8.

¹⁰ *Id.*, p. 9.

dens on the right to vote and to associate freely with the party of one's choice.

The Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection "rational basis" test. One may agree that the challenged cutoff date is rationally related to the legitimate interest of New York in preventing party "raiding." But this Court's prior decisions simply do not permit such an approach. Rather, they recognize that:

"... the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims, supra*, at 561-562.

See also *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

Voting in a party primary is as protected against state encroachment as voting in a general election. *Bullock v. Carter, supra*; *Terry v. Adams*, 345 U. S. 461 (1953); *United States v. Classic*, 313 U. S. 299 (1941). And the Court has said quite explicitly that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'" *Dunn v. Blumstein, supra*, at 337 (1972), quoting *Kramer v. Union Free School District, supra*, at 627. See also *Cipriano v. City of Houma, supra*, at 704 (1969); *City of Phoenix v. Kolodziejski, supra*, at 205, 209 (1970). Likewise, the Court has asserted that "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms," *Williams v. Rhodes*, 393 U. S., *supra*, 30-31 (1968), and must be carefully protected from state encroachment. *NAACP v. Alabama, supra*, at 449

(1958); *Bates v. Little Rock*, 361 U. S. 516 (1960); *Gibson v. Florida Legislative Investigations Committee*, 372 U. S. 539 (1963).

The inquiry thus becomes whether the instant statute, burdening as it does fundamental constitutional rights, can withstand the strict judicial scrutiny called for by our prior cases. The asserted state interest in this case is the prevention of party "raiding," which consists of the movement or "cross-over" by members of one party into another's primary to "defeat a candidate who is adverse to the interests they care to advance."¹¹ The typical example is a member of one party deliberately entering another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election. A State does have an interest in preventing such behavior, lest "the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—be seriously impaired," *Rosairo v. Rockefeller*, — F. 2d — (CA2). The court below held flatly that the state interest in deterring "raiding" was a "compelling" one. *Id.*, at —.

The matter, however, is not so easily resolved. The importance or significance of any such interest cannot be determined in a vacuum, but rather in the context of the means advanced by the State to protect it and the constitutionally sensitive activity it operates to impede. The state interest here is hardly substantial enough to sustain the presumption, upon which the statute appears to be based, that most persons who change or declare party affiliation nearer than eight to 11 months to a party primary do so with intent to raid that primary. Any such presumption assumes a willingness to manipulate the system which is not likely to be widespread.

¹¹ Tr. of Oral Arg., p. 29.

Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. And citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations. Such candidates or issues often are not apparent eight to 11 months before a primary. That a citizen should be absolutely precluded so far in advance from voting in a party primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State, runs contrary to the fundamental rights of personal choice and expression which voting in this country was designed to serve.

Whatever state interest exists for preventing cross-overs from one party to another is appreciably lessened where, as in the case of petitioners, there has been no previous affiliation with any political party. The danger of voters in sympathy with one party "raiding" another party is insubstantial where the voter has made no prior party commitment at all. Certainly, the danger falls short of the overriding state interest needed to justify denying petitioners, so far in advance, the right to declare an initial party affiliation and vote in the party primary of their choice.

III

In *Dunn, supra*, at 343, the Court emphasized that the State, in pursuing its legitimate interest,

"cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' *NAACP v. Button*, 371 U. S. 419, 438

(1963); *United States v. Robel*, 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro v. Thompson, supra*, 394 U. S., at 631. And if there are other, reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Shelton v. Tucker*, 364 U. S. 479, 488 (1960).

The Court states that placing the enrollment deadline before the preceding general election serves well the state interest in discouraging party "raiding."¹² This fails to address the critical question of whether that interest may be protected adequately by less severe measures. A foreshortening of the challenged period in this case would not leave the party structure of New York helpless and vulnerable to "raiding" activities. Other States, with varied and complex party systems, have maintained them successfully without the advanced enrollment deadline imposed by New York.

Partisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates. The crossover in registration from one party to another is most often impelled by motives quite unrelated to a desire to raid or distort a party's primary. To the extent that deliberate raiding occurs, it is usually the result of organized effort which depends for its success upon some relatively immediate concern or interest of the voters. This type of effort is more likely to occur as a primary date draws near. If New York were to adopt a more reasonable enrollment deadline, say 30 to 60 days, the period most vulnerable to raiding activity would be pro-

¹² Court opinion, p. 9.

ected. More importantly, a less drastic enrollment deadline than the eight or 11 months now imposed by New York would make the franchise and opportunities for legitimate party participation available to those who constitutionally have the right to exercise them.¹³

¹³ Petitioners also suggest other "less drastic" means of protecting the State's interest: greater reliance on the summary disenrollment procedures of § 332 of the State's election law and loyalty oaths, restrictive party affiliation rules optional for those parties who wish them, limitation of the statute's operation to persons with pre-existing party affiliations, and criminal sanctions for fraudulent participation in the electoral process. Tr. of Oral Arg., pp. 13-21. I make no judgment either on the efficacy of these alternatives in protecting the State's interest or on their potential infringement of constitutionally protected rights. Their presence, however, points to the range and variety of other experimental techniques available for New York to consider.

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IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN, and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of the State of New York, JOHN P. LOMENZO, Secretary of State of the State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of the State of New York, JOHN P. LOMENZO, Secretary of State of the State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Respondents.

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR REHEARING

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN, and KAREN LEE
GOTTESMAN, individually and on behalf of all others
similarly situated,

Petitioners,

—against—

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JOHN P. LOMENZO, Secretary of State of the State of
New York, MAURICE J. O'ROURKE, JAMES M. POWER,
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CERTIORARI TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an order (1) vacating its order affirming the decision of the Court below entered on March 21, 1973, and (2) granting rehearing herein. As grounds for this motion, petitioners state the following:

I.

The Court erroneously failed to consider petitioners' contention that Section 186 is in violation of the Voting Rights Act of 1970.

In refusing to pass upon petitioners' contention that Section 186 of New York's Election Law was in violation of 42 U.S.C. §1973(a)(a)-1(d), a majority of the Court ruled that petitioners, as long-time residents of New York, lacked standing to challenge the durational residence requirement established by Section 186. However, whatever the correctness of such a rigid view of standing,¹ it has no application to petitioners' invocation of the Voting Rights Act of 1970, since the 30 day limitation contained therein was explicitly designed to benefit both long-time residents as well as newly arrived voters. Cf. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970). On March 11, 1970, on the eve of Senate passage of the Voting Rights Act of 1970, Senator Goldwater delivered the principal floor speech discussing 42 U.S.C. §1973(a)(a)-1(a), in which he stated:

¹ E.g., Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962); Jaffee, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961); *Barrows v. Jackson*, 346 U.S. 249 (1953).

"To put it bluntly, the election system of the world's greatest republic and democracy is not geared to insuring that the maximum number of citizens will be eligible to vote. In many ways it even discourages or makes it impossible for citizens to register . . .

"Mr. President, the record should show that there is another important group of citizens who will benefit from the requirement that States shall keep their voting lists open until at least 30 days before a Presidential election.

"The point must be made absolutely clear that my amendment is intended to remove all the insidious effects which these archaic statutory limitations may have on a citizen's free exercise of his right to choose the President.

"To this end, my proposal is expressly designed to help not only new residents of a State but also citizens who have lived for a long time in a state.

"Mr. President, one of the most bizarre features now included in some States' election laws is the fact that citizens who have just moved into a State may register to vote as late as 30 days or even 5 days before a Presidential election, but longtime residents of that same State are required to apply for registration as much as nine months before the election.

"What nonsense. Nine months prior to the election few people may be thinking about that event. But by 30 days before the polls open, political interest will have reached fever pitch.

"So, I want to make it very clear that my proposal is intended to mean that all citizens, both new residents

and longtime residents shall be permitted to register or otherwise qualify to vote for their President at least until 30 days before the election." *Congressional Record*, March 11, 1970, pp. 6989-6995 (emphasis added).

Read against the background of Senator Goldwater's explicit intention to confer benefits upon long-time residents, the majority's refusal to consider petitioners' contention that 42 U.S.C. §1973(a)(a)-1(d) of the Voting Rights Act of 1970 applies to Presidential primaries, as well as to the general election, was clearly erroneous.

II.

The Court erroneously characterized petitioners' failure to have registered for the 1971 local elections as a volitional act justifying their exclusion from the 1972 Presidential primary.

On at least three occasions, the majority alludes to petitioners' volitional failure to have registered during 1971 as a justification for placing onerous restrictions upon their ability to participate fully in the 1972 Presidential elections. *Slip Opinion*, p. 3, n. 4; p. 6, p. 10. Indeed, the crux of the majority's opinion appears to be contained in its observation that:

"The petitioners do not claim that they were unaware of New York's deadline for enrollment." *Slip Opinion*, p. 6, n. 6.

However, Judge Mishler, writing for the District Court, in rejecting the contention that petitioners waived their voting rights by not registering in 1971, expressly stated

what every person involved in New York elections knows to be true—that thousands of New Yorkers are disenfranchised annually by Section 186 without even an inkling of its existence. Lest there be any doubt concerning the matter, petitioners unequivocally assert that they were totally unaware that in order to vote in a June Presidential primary, it was necessary for them to have registered by the preceding October 2. No such requirement exists anywhere else in the United States and it is patently unfair to attribute notice of such a unique voting bar to young voters seeking to register for the first time. Cf. *Moser v. United States*, 341 U.S. 41 (1951).

The injustice of treating petitioners as though they had wilfully failed to satisfy Section 186 is heightened by the fact that New York's unique eight to eleven month cut-off is not even spelled out explicitly in its Election Law. It must be gleaned, instead, from a highly complex set of inter-related statutes which have the effect of establishing the cut-off without ever explicitly establishing it. Counsel submits that, prior to this case, fewer than 20 election lawyers in the State of New York understood the convoluted operation and impact of Section 186. To ascribe notice of Section 186 to thousands of unsophisticated persons attempting to register for the first time constitutes the imposition of an unduly harsh legal fiction in conflict with reality and with the finding of the District Court.

Finally, the assumption by the majority that a major distinction exists between those impediments which "totally" deny the franchise and those impediments which merely render it "difficult" to vote is demonstrably unsupported.

Non-participation in the electoral process has reached critical proportions in the United States, but nowhere is it a more pervasive problem than in the City and State of New York. In the three most populous boroughs of New York City (Manhattan, Brooklyn and the Bronx), voter participation in the 1972 Presidential election hovered at 40 per cent of the eligible electorate. In marked contrast however, to the appallingly low level of general voter participation was the finding that 89.6 per cent of the registered electorate voted in the 1968 Presidential election. Thus, it is now universally accepted that the primary impediment to increased participation in the electoral process is cumbersome and archaic voter registration machinery, exemplified by Section 186 of New York's Election Law, which makes it difficult—although not “totally” impossible—for unsophisticated members of racial and ethnic minorities to participate in the electoral process. Kelley, Ayres and Bowen, *Registration and Voting: Putting First Things First*, 61 American Political Science Review, 359 (1967); *Beare v. Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971); *Bishop v. Lomenzo*, 350 F. Supp. 576 (E.D.N.Y. 1972); *Young v. Gross*, 462 P.2d 445 (1972).

By appearing to insulate such cumbersome machinery from meaningful judicial review merely because it does not “totally” disenfranchise prospective voters, the majority's opinion insures the continuation of an electoral system which, in Senator Goldwater's words:

“... is not geared to insuring that the maximum number of citizens will be eligible to vote. In many ways it even discourages or makes it impossible for citizens to register ...” *Congressional Record*, March 11, 1970, p. 6989.

As the Kelley study establishes, a direct, statistically demonstrable, correlation exists between electoral participation and the removal of cumbersome registration provisions such as Section 186. Given such an unquestioned statistical correlation, it is the blind erection of a distinction without a difference to provide meaningful judicial review for "total" disenfranchisement, but to refuse to provide meaningful review for cumbersome provisions short of "total" disenfranchisement which have the identical practical effect of barring the franchise to millions of Americans.

Moreover, it cannot be disputed that our patchwork of onerous election laws—exemplified by Section 186—operates with disproportionate severity upon the very segment of the American electorate which has historically suffered "total" disenfranchisement—members of racial and ethnic minorities. The Kelley study demonstrates beyond a doubt that statutes like Section 186—erecting cumbersome and difficult barriers to voting—act primarily to exclude Blacks, Puerto Ricans and Chicanos from exercising the franchise. Middle America, highly literate and politically sophisticated, experiences little difficulty in surmounting the essentially administrative hurdles to registration. But that segment of the American electorate which lacks verbal skill and political sophistication is excluded from the ballot as effectively as if they had been "totally" disenfranchised.

If the effects of prior discrimination in access to the ballot can be insulated from meaningful judicial review merely because a state law having the effect of excluding unsophisticated persons from the ballot is framed short of

"total" disenfranchisement, the continued estrangement of millions of Americans from our democratic system will be insured. Petitioners urge the Court, at the least, to remand this matter for a plenary evidentiary hearing on the "total" disenfranchising effect which Section 136 and similar statutes exercise upon unsophisticated voters seeking to join the political process for the first time.

Respectfully submitted,

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Certificate of Counsel

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay pursuant to Rule 58(1).

Counsel for Petitioners